(2)

No. 00-454-CFX Title: Atkinson Trading Company, Inc., Petitioner
v.
Joe Shirley, Jr., et al.

Docketed: September 22, 2000 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Sep 22 2000	Petition for writ of certiorari filed. (Response due October 22, 2000)
	Oct 23 2000	Brief amicus curiae of Interstate Natural Gas Association of America filed.
	Oct 23 2000	Brief of respondents Joe Shirley, et al. in opposition filed.
	Oct 23 2000	Brief amici curiae of Pacific Legal Foundation, et al. filed.
	Oct 23 2000	Brief amici curiae of South Dakota, et al. filed.
	Nov 1 2000	Reply brief of petitioner Atkinson Trading Company, Inc. filed.
	Nov 8 2000	DISTRIBUTED for Conference of November 22, 2000
	Nov 27 2000	Petition GRANTED. SET FOR ARGUMENT March 27, 2001. **********
	Jan 5 2001	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner and counsel for the respondent.
	Jan 9 2001	Brief amici curiae of Roberta Bugenig, et al. filed.
	Jan 11 2001	Joint appendix filed.
	Jan 11 2001	Brief of petitioner Atkinson Trading Company, Inc. filed.
	Jan 11 2001	Joint lodging materials received from counsel for the parties.
	Jan 11 2001	Brief amicus curiae of Interstate Natural Gas Association of America filed.
	Jan 11 2001	Brief amicus curiae of Association of American Railroads filed.
	Jan 11 2001	Brief amici curiae of South Dakota, et al. filed.
	Jan 11 2001	Brief amicus curiae of Proper Economic Resource Management, Inc. filed.
	Jan 26 2001	CIRCULATED.
	Feb 2 2001	Record filed.
	Feb 14 2001	Brief amici curiae of Confederated Tribes of Umatilla Indian Reservation, et al. filed.
	Feb 14 2001	Order extending time to file responsents' brief on the merits to and including February 16, 2001. A reply brief, if any, is to be filed on or before March 19, 2001. Rule 29.2 does not apply.
	Feb 14 2001	Brief amici curiae of Shakopee Mdewakanton Sioux (Dakota) Community, et al. filed.
	Feb 15 2001	Brief of respondents Joe Shirley, et al. filed.
	Feb 15 2001	Brief amici curiae of Colorado River Indian Tribes, et al. filed.
	Feb 15 2001	Brief amici curiae of Assiniboine and Sioux Tribes of Ft.Peck Indian Res., et al. filed.
	Feb 16 2001	Brief amicus curiae of United States filed.

No. 00-454-CFX

Entry	Date	Proceedings and Orders
	Feb 22 2001	LODGING consisting of twenty copies of Navajo Supreme Court document submitted by the Solicitor General.
	Feb 28 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 2 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Mar 5 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 16 2001	Reply brief of petitioner Atkinson Trading Co. filed.
	Mar 27 2001	ARGUED.

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No. 00-____

IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Indian tribe may tax a transaction occurring between two non-Indians on fee land within the reservation?

RULE 29.6 STATEMENT

Petitioner Atkinson Trading Company, Inc., is a privately owned corporation. It has no parent corporation and no publicly held company owns any stock in the petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Atkinson Trading Company, Inc. ("Atkinson Trading"), respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-51a), is reported at 210 F.3d 1247. The court of appeals' unpublished order denying Atkinson Trading's petition for rehearing and rehearing *en banc* by an equally divided vote is reprinted at App 52a. The opinion and order of the United States District Court for the District of New Mexico (App. 53a-69a) are unreported. The opinion of the Navajo Supreme Court (App. 70a-90a) is unreported. The opinion and order of the Navajo Tax Commission (App. 91a-101a) are unreported.

JURISDICTION

The opinion of the court of appeals was issued on May 2, 2000. In an order dated June 26, 2000, the court of appeals denied Atkinson Trading's timely petition for rehearing or rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The Navajo Hotel Occupancy Tax, Title 24, Navajo Tribal Code §§ 101-142 (eff. Jan. 1, 1993), is reproduced in its entirety in the Appendix. App. 102a-124a.

STATEMENT OF THE CASE

Petitioner Atkinson Trading, is a non-Indian corporation operating a hotel on its own fee land within the Navajo Indian Reservation (the "Reservation"). Petitioner challenges the authority of respondents, various officials of the Navajo

Indian Nation (the "Tribe"), to tax transactions occurring wholly between non-Indians on that fee land. Specifically, the Tribe seeks to impose a hotel occupancy tax on Atkinson Trading's overnight guests, who are not members of the Tribe. The courts below upheld the tax, despite the fact that the hotel's guests have no commercial relationship with the Tribe.

This holding conflicts with the framework established by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Those cases recognize that the inherent sovereign powers of an Indian tribe are limited to those necessary for tribal self-government. They establish a general presumption that a tribe does not have authority over the activities of a nonmember on fee land within a reservation. While *Montana* recognizes an exception permitting tribal jurisdiction over persons who enter into a consensual commercial relationship with a tribe or its members, the hotel guests here have no such relationships. The Tenth Circuit's ruling—delivered by a split panel and sustained on a 5-5 *en banc* vote—is contrary to Supreme Court precedent, to Ninth Circuit precedent, and to district court decisions involving identical facts.

I. STATEMENT OF FACTS

A. Cameron Trading Post

The Navajo Indian Nation is a federally-recognized Indian tribe with a large reservation spanning parts of Arizona, New Mexico and Utah. App. 96a. Atkinson Trading is a New Mexico corporation principally owned by Edwin J. Atkinson, a non-Indian. App. 95a. Atkinson Trading owns and operates Cameron Trading Post (the "Trading Post"), a hotel and tourist business located near Cameron, Arizona, within the exterior boundaries of the Reservation. App. 96a.

The Trading Post is located in north central Arizona, about 50 miles from the entrance to Grand Canyon National Park. It is adjacent to U.S. Highway 89, about a mile from the intersection with Arizona Highway 64, which leads to the park entrance. The Trading Post consists of a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. App. 96a. Atkinson Trading's "businesses on the property are focused on the tourist market and deal almost exclusively with non-members of the Navajo Nation, who are primarily attracted to the property because of its proximity to the Grand Canyon." *Id.* A significant portion of its hotel business is provided by tour buses that stop overnight either before or after visiting the Grand Canyon. App. 57a.

Atkinson Trading owns the property underlying the hotel in fee simple. App. 96a. Atkinson Trading's title to the property is directly traceable to a fee patent issued by the United States. At the time that the patent was issued, the property was not located within the Navajo Reservation. Nor was the property located within the Reservation when the Trading Post was opened in 1916. Subsequently, however, the external boundaries of the Reservation were extended by Act of Congress; the Reservation now completely surrounds Atkinson Trading's fee land. *See* App. 96a (citing Act of Congress of June 14, 1934, Ch. 521, 48 Stat. 960-62).

Neither Atkinson Trading nor any of its non-Indian guests has any agreement, contractual or otherwise, with the Tribe. *See* App. 65a. Prior to the Navajo Tax Commission hearing, Atkinson Trading's only business with individual tribal members consisted of the employment of Indian workers at the Trading Post, "a small amount of sales to members and a small amount of purchases of arts and crafts." App. 96a. However, Atkinson Trading has not made any purchases of arts and crafts from tribal members since 1995. *Id.*

B. The Tribal Hotel Occupancy Tax

On July 30, 1992, the Navajo Nation Council enacted a Hotel Occupancy Tax ("HOT"), 24 Navajo Tribal Code §§ 101-142 (eff. Jan. 1, 1993) (App. 102a-124a). The HOT "purports to tax all persons who pay for the use or possession of a room or space which costs $2.00 or more per day in a hotel which is located within the exterior boundaries of the Navajo Nation." App. 98a. Hotel guests are required to pay a tax of 8% of the price of the room to the Tribe. 24 Navajo Tribal Code § 103. The tribal code "requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission, file reports on the tax with the Navajo Tax Commission and pay penalties and interest for failure to do so." App. 98a.

The Navajo Tax Commission interprets the HOT to apply to "guests at all hotels within the exterior boundaries of the Navajo Nation without regard to whether it is located on trust or fee land." App. 98a.

II. PROCEDURAL HISTORY

In 1993, Atkinson Trading filed a complaint against the Tribe seeking a declaratory judgment that the Tribe lacked the authority to impose the HOT on the hotel's overnight guests. The United States District Court for the District of New Mexico dismissed the complaint without prejudice, concluding that Atkinson Trading was required to exhaust its tribal remedies. *See Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506 (D.N.M. 1994).

Atkinson Trading then filed an administrative challenge to the HOT before the Navajo Tax Commission ("NTC"). Atkinson Trading contended that its guests were not subject to tribal authority under the general rule of *Montana* because they were nonmembers on fee land. It also argued that the

HOT did not satisfy either of the two exceptions set forth in *Montana*.[1]

After an administrative hearing, the NTC issued findings of fact and conclusions of law, upholding the tax as applied to non-Indian guests at the hotel. *See* App. 91a-100a. The NTC concluded that, under this Court's decision in *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130 (1982), "the Navajo Nation, in exercising its right of territorial management, has the power to assess a tax on non-Indians within its jurisdiction; i.e., within the exterior boundaries of the Navajo Nation." App. 94a. The NTC rejected Atkinson Trading's argument that *Montana* governs all questions of tribal authority over non-Indian conduct on reservation fee land, concluding that *Montana* "does not serve to limit this general power to tax which was recognized in *Merrion*." App. 94a. Atkinson Trading appealed that decision to the Navajo Supreme Court, which affirmed the NTC's decision. App. 70a-90a.

After exhausting its tribal remedies, Atkinson Trading filed a renewed complaint for declaratory relief in federal district court, invoking federal question jurisdiction under 28 U.S.C. § 1331. On cross motions for summary judgment, the district court affirmed the application of the HOT to petitioner's non-Indian guests. App. 53a-68a. The court reasoned that "the consensual-relationships test of *Montana* and *Strate* is the proper framework within which to analyze this taxation

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[1] The first exception permits a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (citations omitted). The second authorizes civil authority over non-Indian conduct on the reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citations omitted).

case." App. 63a. However, it asserted that the "*Merrion* provision-of-services or benefits-of-a-civilized-society factors . . . are relevant to the *Montana* test because they are indicators that the necessary consensual relationship is present . . . ." App. 64a.

The court therefore crafted an entirely new standard for determining tribal tax authority over nonmembers:

> The Court's review of case law concerning tribal jurisdiction over nonmembers indicates that the extent to which a tribe will be allowed to regulate or affect non-Indian activity is often determined on a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction.

App. 64a. While the district court acknowledged that "[n]o explicit consensual relationship was created between the Tribe and the guests," App. 65a, it held that, under its sliding scale, "where Plaintiff's customers travel onto the reservation, stay overnight, and take advantage of the establishment of a civilized society there, that is consensual activity." *Id.* The court reasoned that "the guests voluntarily put themselves in the position of possibly needing assistance from tribal personnel," including tribal EMS personnel, police officers and fire officials. App. 66a. On the other side of the balance, the court concluded that the "burdens imposed by the Tribe on the nonmember guests . . . are minimal" because "the HOT involves only the payment of a tax of 8% of the room rate." App. 67a.

On appeal, a divided panel of the Tenth Circuit affirmed. App. 1a-51a. Writing for a two-judge majority, Judge McKay adopted the rationale of the district court. First, the court rejected petitioner's argument that the nature of the land within the reservation determined the applicable rule. Atkinson Trading argued that *Montana* and *Strate* govern all assertions of tribal jurisdiction over nonmembers on fee land,

while *Merrion* establishes a separate rule for the authority of a tribe to tax nonmember conduct on *tribal* lands. While recognizing that this Court's decisions "did make an issue of the fee status of the land in question," the majority opined that petitioner's "reading of Supreme Court case law derives from an unwarranted reliance on a coincidence of facts and results . . . ." App. 15a-16a. In its view, "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." App. 11a. The court held that *Montana* and *Strate* are "more accurately explained as instances in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations." App. 17a. The majority opinion therefore expressly adopted the district court's balancing test. App. 25a-26a.

The majority then applied this balancing test to find an "implied" consensual relationship between petitioner's guests and the Tribe, based upon the guests' acceptance of "the privilege of remaining on the reservation under the protection and accommodation of the services provided by the tribe." App. 29a. The "consensual relationship exists in that the non-member guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability" for the HOT. *Id.* The majority also agreed with the district court that the burden imposed by the tax was not disproportionate to the benefits of the tribal services. App. 30a-31a. Thus, it upheld the Tribe's power to tax petitioner's guests.

Judge Briscoe dissented. "[I]t is clear," she reasoned, "that the analytical framework outlined in *Montana* . . . and reaffirmed in *Strate* . . . , is the proper one to apply." App. 37a. Judge Briscoe criticized the majority opinion for giving mere lip service to the *Montana* analysis: "Although the majority purports to apply the *Montana* framework, it makes

several major missteps in doing so." App. 37a. First, "the majority mistakenly concludes it is irrelevant whether the nonmembers' conduct takes place on tribal land or non-Indian fee land. A proper reading of *Montana* and *Strate* indicates this distinction is, in fact, significant." *Id.* Judge Briscoe pointed to several passages from both decisions that indicated the importance of the status of fee land. App. 37a-38a.

Judge Briscoe further criticized the majority's reliance on *Merrion* to establish its balancing test. "In my view, it is improper to modify the *Montana* framework with any language or 'factors' derived from *Merrion*." App. 41a. She explained the two separate lines of cases:

> *Montana* operates from a presumption that, absent express authority derived from a treaty or statute, a tribe lacks jurisdiction over nonmembers' conduct on nonmember fee land . . . . In contrast, *Merrion* operates from a presumption that a tribe retains inherent sovereign authority to regulate nonmembers' conduct occurring on tribal land, and thus contains no particular 'test' or 'factors' for deciding tribal jurisdiction.

App. 41a-42a. The "majority's newly adopted test," Judge Briscoe reasoned, "subverts the question of whether a consensual relationship exists between the nonmembers and the tribe and replaces it with an entirely different inquiry that, in my view, makes it substantially easier for a tribe to establish jurisdiction over a nonmember." App. 42a.

When properly applied, Judge Briscoe concluded, the *Montana* test invalidates the tax at issue. The first exception to the *Montana* rule, that of "consensual relationships," was not met. With respect to the majority's "implied consent" rationale, Judge Briscoe concluded that "there is no evidence that any of [Atkinson Trading's] non-Indian guests have been provided medical, health protection, or tourism services by the Nation." App. 47a-48a (footnotes omitted).

Atkinson Trading filed a timely petition for rehearing or rehearing *en banc*. In an order dated June 26, 2000, the original panel denied the petition for rehearing. An evenly-divided *en banc* court denied the petition for rehearing *en banc*: "As the active judges split five to five in response to the poll, the suggestion for en banc rehearing fails." App. 52a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision in this case contravenes the principles firmly established by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), governing tribal authority over non-Indians on fee land. In lieu of the "main rule" and exceptions recognized in those cases, the opinion creates an unsupported "sliding scale" standard. By substituting a nebulous balancing test for the bright lines adopted by this Court, the lower court's decision threatens to inject great uncertainty into tribal regulation of *all* non-Indian conduct on reservations throughout the country.

The disagreement within the Tenth Circuit on this issue is reflective of a broader conflict among federal courts. The approach to tribal taxation taken by the majority opinion here is in conflict with that taken by the Ninth Circuit, *see Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000), and gives rise to a result squarely inconsistent with decisions in that Circuit. *See In re Haines*, 245 B.R. 401 (D. Mont. 2000); *Rose v. Adams*, No. CV 99-126-BLG-JDS, Order (D. Mont. Aug. 7, 2000) (App. 125a-134a).

The question of whether tribal governments may tax non-Indian conduct on reservation fee land is an important one. Tribes have found taxation of non-Indians an easy source of revenue because non-Indians have no voice in tribal government. As tribal budgetary demands increase, so too does the pressure on tribal leadership to shift the burden of

paying for tribal government to outsiders. The balancing test adopted by the Tenth Circuit makes that shift all the more likely, by permitting tribal taxation of non-Indians by virtue of the mere *possibility* of the receipt of tribal services. This decision opens the floodgate to all manner of tribal taxation of non-Indians, in contravention of the standards established in *Montana* and *Strate*. It should receive immediate review.

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH *MONTANA* AND *STRATE*

The court of appeals' decision disregards this Court's fully articulated standard with respect to tribal authority over nonmember conduct on reservation fee land. In its place, the lower court adopted a multi-factor, "case-by-case approach" that has no relationship to prior decisions of this Court. *See* App. 17a.

A. The Court of Appeals Erroneously Refused to Accept the Clear Distinction between Fee and Tribal Lands Established by This Court's Decisions

The court of appeals' most fundamental mistake was its refusal to recognize the pivotal importance of the status of the land in determining the scope of a tribe's civil authority over nonmembers. The court of appeals asserted that this Court "did not intend that the fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." App. 11a. Rather, "fee status is simply *one* factor a court should consider in applying the *Montana* framework and weighing the interests of the nonmembers against those of the tribe . . . ." App. 16a (emphasis added). Nothing in this Court's jurisprudence, the court concluded, "suggest[s] that fee status is a limitation on the power to tax." *Id.*

This conclusion is plainly inconsistent with this Court's decisions. *Montana* centers the analysis of tribal civil authority on the status of the land:

> The *Montana* Court recognized that the Crow Tribe retained power to limit or forbid hunting or fishing by nonmembers on land still owned by or held in trust for the Tribe. The Court held, however, that the Tribe lacked authority to regulate hunting and fishing on land within the Tribe's reservation *owned in fee simple by non-Indians*.

Strate, 520 U.S. at 446-47 (citations omitted) (emphasis added). Again, in *Strate*, this Court drew a clear distinction between tribal authority over nonmember conduct on tribal lands and tribal authority over nonmember conduct on fee land, holding that the Tribes had no civil jurisdiction over the conduct of nonmembers traveling on a highway that was the "equivalent" of fee land. *See Strate*, 520 U.S. at 454-56. Thus, the distinction between tribal and fee lands has been consistently applied in determining the limits to tribal authority over the conduct of nonmembers. *See, e.g., El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (distinguishing *Strate* on ground that "the events in question here occurred on tribal lands"); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999); *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000).[2]

This analytical focus on the tribal/fee land distinction is neither "a coincidence of facts," App. 15a, nor an "arbitrary"

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[2] Fee land owned by non-Indians may comprise a very substantial share of a reservation. *See, e.g., Montana*, 450 U.S. at 548 (28% of Crow Reservation owned in fee by non-Indians); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 415 (1989) (fee lands constitute over half of open area of the reservation).

inquiry. *See* App. 25a. Rather, it stems from the limited nature of tribal sovereignty. "[T]hrough their original incorporation into the United States . . . tribes have lost many of the attributes of sovereignty." *Montana*, 450 U.S. at 563. As dependent sovereigns, tribes have substantial authority over their own members, but they do not have similar authority over nonmembers: The "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. Thus, "In the main . . . , 'the inherent sovereign powers of an Indian tribe'—those powers a tribe enjoys apart from express provision by treaty or statute—'do not extend to the activities of nonmembers of the tribe.'" 520 U.S. at 445-46 (quoting *Montana*, 450 U.S. at 565).

Because tribal governments do not enjoy the authority "to determine their external relations," *Montana*, 450 U.S at 564 (citation omitted), their limited powers over nonmembers generally arise from a different source—that of "a landowner's right to occupy and exclude." *Strate*, 520 U.S. at 456. A tribe thus may gain authority over nonmembers present on *tribal* lands because the tribe has authority to exclude them from the lands altogether. *See Montana*, 450 U.S. at 559; *Strate*, 520 U.S. at 454. However, tribal regulation of nonmembers "on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations . . . ." *Montana*, 450 U.S. at 564. A tribe's loss of a landowner's "right of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others." *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). Thus, "[r]egarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of power tribes retain to exercise 'forms of civil jurisdiction

over non-Indians.'" *Strate*, 520 U.S. at 453 (citation omitted).

Instead of simply applying the general rule of *Montana* to the conduct on fee land at issue here, the court of appeals set forth its own balancing test, in which it purported to weigh "(1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved." App. 25a. In its view, this multi-factor test "leaves the Supreme Court's Indian law jurisprudence more cohesive and intelligible," *id.*, because it "rejects the arbitrary factual basis of fee status as the determinative factor of the *Montana* standard." *Id.* No other court has found it necessary to elaborate on *Montana* and *Strate* in this manner.

The court of appeals apparently thought its test was desirable as a means of harmonizing those decisions with *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion*, this Court examined the power of an Indian tribe to impose a severance tax on oil and gas production resulting from leases *on tribal trust land*. *See id.* at 133 ("the reservation contains 742,315 acres, all of which are held as tribal trust property"); *id.* at 135-36 (severance tax imposed "on oil and gas production on tribal land"). The *Merrion* Court relied upon *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), an earlier case that had also involved a tax on transactions on tribal land. Borrowing from *Colville*, the *Merrion* Court reasoned that the "'power to tax transactions *occurring on trust lands* and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or by necessary implication of their dependent status.'" 455 U.S. at 137 (emphasis added) (citation omitted). Thus, where a nonmember does business with the tribe or its members on

tribal lands, a tribe may tax the nonmember's conduct. This holding is, of course, perfectly consistent with the distinction drawn in *Montana* between fee lands and tribal lands and needs no further harmonization. By ignoring this distinction, the court of appeals seriously misapplied the case law.[3]

In any event, the novel balancing test adopted by the court of appeals is neither more "intelligible" nor more practical than the rules laid down by this Court. That test is "a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation or other imposition of jurisdiction." App. 20a. The court of appeals did not explain how one might measure either the "impact of the [nonmember's] activity on the tribe" or the "severity" of the tribe's proposed tax. Nor did it explain how courts or tribes might balance these essentially imponderable factors against one another.

Thus, at least in the area of taxation, the court of appeals effectively replaced *Montana*'s simple rules for tribal regulation of nonmembers with its own multi-factor balancing test. But *Montana* itself eschewed the need for a separate test for tribal taxation of nonmembers. *Montana* explicitly referred to taxation as an example of regulation that may, under proper circumstances, fall within the consensual relationships exception. 450 U.S. at 565 ("tribe may regulate, *through taxation*, licensing, or other means," nonmember activities that arise out of consensual relationships with the

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[3] The court of appeals also relied heavily on *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). But much of the language of *Buster* on which the court of appeals relied—the portions invoking the concept of territorial sovereignty—has been rejected by this Court. *Montana* cites *Buster* only as an example of the first *Montana* exception. *Buster* thus has no applicability where tribal regulation is directed at parties, like Atkinson Trading's overnight guests, who have *no* contractual or commercial arrangements with a tribe or its members.

tribe or its members) (emphasis added). By including certain taxes in its exceptions, *Montana* makes clear that taxation falls within its general rule that tribes have been divested of their powers over nonmembers on non-Indian land. *See Big Horn*, 219 F.3d at 952. *Strate* confirmed that *Montana* applies to *all* questions of tribal civil jurisdiction over non-Indians—whether regulatory, adjudicatory or taxation—describing *Montana* as "the pathmarking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445.

The court of appeals' confusion concerning the relationship between *Montana* and *Merrion* requires clarification from this Court. The area of taxation is too important to both tribes and non-Indians who transact business on reservation fee land to be left subject to vague balancing tests. Moreover, the test proposed by the court of appeals might, by its terms, be read to apply to *all* tribal regulation, not simply taxation. It thereby contains the potential to disrupt nonmember conduct on fee land in a variety of contexts. This egregious failure to follow the established framework of this Court should be addressed immediately.

B. In Applying the "Consensual Relationship" Exception, the Court of Appeals Eviscerated This Court's Decision in *Strate*.

The court of appeals also erred profoundly in its application of *Montana*'s consensual relationship exception. Analyzing this exception through the filter of its balancing test, the court of appeals held, "The burden imposed on Appellant's guests is not disproportionate to the benefits they received by availing themselves of Navajo tribal services, including tourist services." App. 32a. The court thereby found a consensual relationship where hotel guests had absolutely no "commercial dealing[s], contracts, leases, or other arrangements" with the tribe or its members. *See*

Montana, 450 U.S. at 565. The lower court's misinterpretation of the consensual relationship exception would—contrary to this Court's admonition—"severely shrink the rule." *See Strate*, 520 U.S. at 458.

The district court made a factual finding sufficient to conclude that *Montana*'s consensual relationship exception was not met in this case: "No explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." App. 65a. Notwithstanding this finding, the court of appeals reasoned that non-Indian guests at the Trading Post had "implicitly" consented to imposition of the tax by virtue of their staying on the Reservation. App. 29a ("[T]he consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability for the Navajo Hotel Occupancy Tax."). The guests of the Trading Post, the court observed, benefit from potential "police, fire, emergency medical, and tourist services provided by the tribe . . . ." App. 27a.[4]

This reasoning misses the point of *Strate*. The driver in *Strate* could also have refrained from passing through the reservation. That driver could also have potentially benefited from emergency police and medical services provided by the tribes. Indeed, *Strate* specifically commented on the possibility of tribal police patrolling state highways passing through the reservation: "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway . . . ." *Strate*, 520 U.S. at 456 n.11. Nevertheless, the *Strate* Court

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[4] As the Judge Briscoe points out in dissent, there is little record support for the conclusion that the Tribe has ever provided *any* actual services to non-Indian guests at the hotel. *See* App. 47a.

did not consider the possibility of emergency and police services to the non-Indian defendant sufficient enough to give rise to a consensual relationship with the tribes. *See id.* at 456-57. If the possibility of emergency services is insufficient to support tribal jurisdiction after an automobile accident, it certainly is insufficient where a non-member is simply spending the night on the reservation.

The lower courts here analogized the "implied consent" granted by a non-Indian guest at the hotel to a driver on a New Mexico road, who, by virtue of driving in New Mexico, is "deemed to have given implied consent to breath tests for alcohol." App. 28a. But this analogy is misplaced, for it presumes the answer to the very jurisdictional question at issue. A driver present in New Mexico is subject to a breathalyzer statute because the driver is subject to the laws of New Mexico. The driver is subject to the laws of the State because physical presence within a State is sufficient to subject an individual to that State's jurisdiction. *See, e.g., Burnham v. Superior Court of California*, 495 U.S. 604, 619 (1990) ("jurisdiction based on physical presence alone constitutes due process"). The same broad territorial jurisdiction does not apply to Indian reservations; as *Montana* and *Strate* demonstrate, mere presence of a non-Indian on the reservation does not subject the non-Indian to tribal regulation. *See Colville*, 447 U.S. at 165 (Brennan, J., concurring in part and dissenting in part) ("it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries").[5]

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[5] Similarly, the court of appeals was wrong to rely on an A.L.R. annotation collecting constitutional challenges to state and local hotel occupancy taxes. App. 30a-31a (citing Noralyn O. Harlow, Annotation, *Tax on Hotel-Motel Room Occupancy*, 58 A.L.R.4th 274, 282 (1987)). None of the challenges was predicated on a lack of sovereignty over the person of the hotel guest. The single case in the annotation that applied a

The court of appeals also suggested that the tax was appropriate because "the tribe accommodates the activity of Appellant and its guests on the reservation." App. 29a-30a. Under its view, "'commercial dealing . . . or other arrangements' may give rise to tribal jurisdiction under the consensual relationship exception." *Id.* (citation omitted). However, what this Court said was that "consensual relationships *with the tribe or its members*" could give rise to tribal taxing authority. *Montana*, 450 U.S. at 565 (emphasis added). By isolating language from its context, the court of appeals adopted an erroneous legal principle.

It is also a dangerous one. If the "potential" receipt of services from the tribe were a sufficient basis for tribal authority over a nonmember, then all nonmembers, wherever and however briefly located on a reservation, would be at risk of tribal jurisdiction. Any time a person passes through an Indian reservation, there is a possibility that the person will benefit from some type of tribal service. Thus, this holding of the court of appeals profoundly undermines the precise holding in *Strate*. This improperly expansive theory of tribal authority warrants review in its own right.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER LOWER FEDERAL COURTS

In light of the Tenth Circuit's substantial departure from established law, it is not surprising that its decision conflicts, both in the standard applied and in the result reached, with

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"benefits/burdens" test had nothing whatsoever to do with that issue. Rather, it examined whether a county hotel occupancy tax "constituted a taking of private property without due process of law." Harlow, *supra*, at 291 (citing *Allegheny County v. Morzo*, 509 Pa. 26, 500 A.2d 1096 (1985)). It sheds no light on the authority of a tribe to tax the nonmember guests of a hotel on fee land.

decisions of other federal courts. In an opinion issued shortly after the Tenth Circuit's decision here, the Ninth Circuit held that the Crow Tribe lacked the power to impose an ad valorem tax on non-Indian utility property on rights-of-way passing through the reservation. *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). Reasoning that the rights-of-way were the equivalent of fee land under the rule of *Strate*, the court held that *Montana*'s general presumption against tribal regulation over non-members applied. *Id.* at 950.

After finding that neither of the *Montana* exceptions were met by the tax at issue, the *Big Horn* court turned to the tribe's argument, identical to that made by the Navajo Nation below, that *Merrion* and *Colville* established a different rule for tribal taxation of nonmembers based on the "inherent sovereign authority" of the tribe. *Id.* at 952. But unlike the Tenth Circuit in this case, the *Big Horn* court eschewed any reliance on *Merrion* or *Colville* in a situation involving non-Indian land: "While both cases contain broad language regarding tribal taxation powers, neither case abrogates *Montana*'s main rule." *Id.* Although *Colville* "is a tribal tax case," the Ninth Circuit reasoned, "it directly address[ed] only Indian taxation power over transactions occurring on Indian land . . . ." *Id.* Similarly, *Merrion* "did not directly address a tribe's power to tax property located on the equivalent of non-Indian fee land." *Id.* Instead, the court concluded, "to the [extent] *Merrion* expresses an opinion about a tribe's taxation of property located on non-Indian fee land, its language indicates that such a tax would be an impermissible extension of tribal jurisdiction." *Id.*

The discord between the Ninth and Tenth Circuits is all the more significant because the Ninth Circuit, in the wake of *Strate*, overruled its own prior precedent to articulate its different approach. In 1991, the Ninth Circuit issued a decision making the same mistake made by the lower court

here. *See Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). *Blackfeet Tribe* relied heavily on *Merrion* for the proposition that the power to tax is a fundamental attribute of sovereignty, no matter whether the tax arises on tribal or non-Indian land. *See id.* at 902. *Big Horn* expressly overruled *Blackfeet Tribe*, reasoning that the *Montana* analysis applies to all exercises of tribal jurisdiction over nonmember conduct on fee land and its equivalent. *See Big Horn*, 219 F.3d at 953. In light of *Strate*, the court reasoned, the *Blackfeet Tribe* decision's "failure to apply *Montana* undermines its precedential value." *Id.* "[T]he tax cannot be justified on the basis of the Tribe's inherent sovereign authority . . . because the tax is no longer on property classified as Indian land." *Id.*

Big Horn recognizes *Montana* as the governing rule for tribal taxation of nonmember conduct on fee land. It also rejects *any* reliance on *Merrion* and its "advantages of a civilized society" standard as a basis for determining tribal civil authority over nonmember conduct on fee land. The Tenth Circuit decision in this case plainly rejected that approach. The bright lines recognized by the Ninth Circuit contrast with the Tenth Circuit's "case-by-case approach" in this case. *See* App. 17a. The standards applied by the two circuits irreconcilably conflict.

That conflict is exemplified by a pair of cases in which the United States District Court for the District of Montana held that nonmembers on fee land could not be subjected to a Crow tribal "resort tax" identical in relevant respect to the Navajo HOT. *See In re Haines*, 245 B.R. 401 (D. Mont. 2000); *Rose v. Adams*, No. CV. 99-126-BLG-JDS (D. Mont. Aug. 7, 2000) (App. 125a-134a). The challenged tribal ordinance imposed a four percent resort tax on plaintiffs' "gross receipts from all goods and services sold or used on the Reservation in connection with a resort business," defined to include campgrounds, dude ranches, guest ranches, hunting

and fishing lodges, bed and breakfast establishments, souvenir shops, hotels, motels and other lodging or camping facilities. *See* Crow Tribal Code tit. XII, ch. 4, § 4.02 (App. 136a-37a). In both cases, non-Indian businesses that owned and operated lodging and recreational facilities on fee land within the Crow Reservation challenged the resort tax as exceeding the tribe's authority over nonmembers. *See In re Haines*, 245 B.R. at 403; *Rose*, Order at 2 (App. 126a).

In each case, the court concluded that the tribe's interest in the transactions at issue was insufficient to support the tax under *Montana*. *See Rose*, Order at 8 (App. 130a) (tribe "cannot point to, nor does there exist any consensual relationship between plaintiffs and the Tribe or its members which would allow the Tribe to tax transactions between nonmembers and the [nonmember] plaintiffs which occur on plaintiffs' non-Indian fee land"). The Montana district court rejected the Crow Tribe's reliance on *Merrion* and its "advantages of a civilized society" argument, reasoning that

> the 'advantages of a civilized society' argument requires that the nonmember first be within the tribe's jurisdiction before the tribe can exercise its inherent sovereign authority to tax . . . . The advantages of a civilized society theory is not a jurisdictional test, but is instead simply a recognition of the source of a tribe's power to tax once jurisdiction over a nonmember has been established.

In re Haines, 245 B.R. at 406; *see also Rose*, Order at 10 (App. 131a-132a). Thus, "[a]s *Big Horn County Electric* instructs, the inherent sovereign power of an Indian Tribe to tax nonmembers is not exempt from [*Montana*'s] general rule and its exceptions." *Rose*, Order at 4 (App. 128a). Finally, in applying *Montana's* exceptions, the court rejected the tribe's argument that the "voluntary presence" of nonmembers on the reservation gives rise to a consensual relationship with the tribe. "[S]imple presence of the plaintiffs' customers on the

reservation does not constitute a consensual relationship between the customers and the Crow Tribe . . . ." *Rose*, Order at 8 (App. 130a).

Big Horn, *In re Haines* and *Rose* demonstrate the discord caused by the court of appeals' decision in this case. That discord has real and immediate consequences for non-Indians on Indian reservations. One need look no further than the Navajo Indian Reservation to see them. The Reservation is located in Arizona, Utah and New Mexico; thus, it spans *both* the Ninth and Tenth Circuits. The obligation of non-Indians to pay the tax will depend upon the part of the Reservation in which they spend the night. The obligation of Atkinson Trading to collect the tax for the relevant years is the result only of the district in which it chose to sue. Had Atkinson Trading chosen to sue in Arizona, where the hotel is located, instead of New Mexico, where Atkinson Trading was incorporated, the result in this case would evidently have been different, controlled by Ninth Circuit law.

Outside of the Navajo Nation, the lower court's decision opens the door to a vastly expanded range of tribal taxation of nonmembers. Because non-Indians have no say in tribal government, they are an easy target for tribal taxation. As a result, tribes throughout the country seek to subject nonmembers to numerous types of taxation, including hotel and resort taxes like the Navajo tax at issue here.[6] Some of those taxes are even imposed exclusively on nonmembers, with tribal members completely exempted from the burden of the tax.[7] Some are imposed on railroads and pipelines—

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[6] *See, e.g.*, Eastern Band of Cherokee Tribal Code § 105-30 ("privilege" tax imposed on "operators of hotels, motels, tourist homes, tourist camps, campgrounds," *etc.*) (App. 135a); Crow Tribal Code tit. XIII, ch. 4 (resort tax on lodges, hotels, campgrounds, *etc.*) (App. 136a-137a).

[7] *See, e.g.*, Red Cliff Band of Lake Superior Chippewas Code § 16.2.1 (imposing gross receipts tax on "every non-member engaged" in the

interstate businesses that are captive on the reservation as a result of immovable investment.[8] Under the tribal codes, nonmembers generally are subjected to these various taxes simply by virtue of their presence on the reservation. As Judge Briscoe noted in dissent, the Tenth Circuit's sliding scale test "makes it substantially easier for a tribe to establish jurisdiction over a nonmember" in order to impose these taxes. App. 42a.

The Tenth Circuit's easily-satisfied approach to "consent" could also generate *more* taxes on nonmembers on fee land. Moreover, as tribes become more reliant on income derived from taxes on nonmembers, the misdirection of the law effected by the Tenth Circuit will become more difficult to correct without disruption to all concerned.

The sliding-scale test adopted by the Tenth Circuit creates uncertainty and will undoubtedly encourage litigation. That litigation is likely to be particularly costly as a result of the requirement that tribal remedies be exhausted prior to access to a federal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). This litigation, for example, has already lasted seven years as it traveled through four layers of

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operation of a restaurant, bar, liquor store, hotel, motel, campsite, marina, theater, *etc.*), *available at* <http://thorpe.ou.edu/codes/redcliff/CH16.html>.

[8] *See* Crow Tribal Code tit. XIII, ch. 2 (railroad and utility property tax) (App. 136a); Three Affiliated Tribes of Fort Berthold Reservation Tribal Tax Code §§ 701 *et seq.* (possessory interest tax on all railroad and utility property on reservation) (App. 138a); Assiniboine & Sioux Tribes of Fort Peck Reservation Tribal Tax Code §§ 301 *et seq.* (utilities tax on all railroad, communications, telegraph, telephone, or pipeline property on the reservation) (App. 139a); Blackfeet Tribal Ordinance Providing For A Possessory Interest Tax, No. 80, *as amended by* Resolution No. 213-87 (1987) (possessory interest tax in all non-exempt possessory interests on the reservation including utility and railroad property) (App. 140a).

courts. And yet the Tenth Circuit's opinion leaves essentially uncertain the fates of myriad other tribal taxes, such as sales, income and transaction taxes, that may be imposed on nonmembers in their homes and commercial establishments on fee lands. Each of these taxes, as applied in different factual circumstances, will also need to be tested against the balance of factors contemplated by the Tenth Circuit.

Unrestrained tribal taxation of nonmembers also has long-term costs for relations between the tribes and the remainder of our society. This Court has warned against "an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro v. Reina*, 495 U.S. 676, 694 (1990). By finding "consent" in a nonmember's mere presence on the reservation and the acceptance of the "benefits of a civilized society," the Tenth Circuit has opened the door to almost unfettered tribal taxation and regulation of persons who have no ability to participate in tribal government. This lack of consent, combined with a vague test and the need for extensive litigation, is a formula for increasing tension between the tribes and the communities of non-Indians who live among and around them.

The issue raised here clearly warrants Supreme Court review. This Court has never addressed a tribal tax imposed on nonmembers on fee land. The authority of the tribes to impose a tax in these circumstances has proved controversial within the Tenth Circuit, where it led to both a split panel decision and a denial of *en banc* rehearing by an equally divided court. It has also proved difficult in the Ninth Circuit, which overruled its own precedent to take a position contrary to that of the Tenth Circuit. Between them, these two circuits encompass the American West. They include a great number—probably the majority—of reservations in

which tribal taxes might be in issue.[9] Given their divergence in approach, the problem of tribal taxation of nonmembers is present here and now.[10]

This case presents the ideal vehicle for resolving this issue. It has satisfied the rigorous requirement for exhaustion of tribal remedies. Its facts are relatively clear. They present the next logical step beyond the plight of the truck driver in *Strate*—a tax on nonmembers visiting a national park who stop for the night on fee land without engaging in any commercial transactions with the Tribe. These paradigmatic facts should permit the Court to analyze with clarity the scope of tribal taxation over nonmembers on fee land.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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[9] According to 1990 census figures, 76.8% of Native Americans living on reservation and tribal trust lands live in States falling within the Ninth and Tenth Circuits. *See* Bureau of the Census, Racial Statistics Branch, Population Division, *American Indian and Alaska Native Areas* 10-21 (June 1991).

[10] Because Indian reservations are concentrated in a few federal circuits, this Court has historically granted certiorari on Indian law issues based on a more limited experience in the courts of appeals. *See* Petition for Writ of Certiorari at 13-15, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997 (95-1872) (noting circuit split between Eighth and Ninth Circuits); Petition for Writ of Certiorari, *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999) (No. 98-6) (noting parallel decisions of Ninth and Tenth circuits).

Respectfully submitted,

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September 22, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-2247

ATKINSON TRADING COMPANY, INC.,
A NEW MEXICO CORPORATION,
Plaintiff-Appellant,

v.

JOE SHIRLEY, JR.; VICTOR JOE; DERRICK B. WATCHMAN; ELROY DRAKE; MEMBERS OF THE NAVAJO TAX COMMISSION; STEVEN C. BEGAY, DIRECTOR OF THE NAVAJO TAX COMMISSION,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-97-1261-BB)

William J. Darling (Margaret P. Armijo with him on the briefs) of William J. Darling & Associates, P.A., Albuquerque, New Mexico, for Plaintiff-Appellant.

Marcelino R. Gomez, Assistant Attorney General (Herb Yazzie, Attorney General of the Navajo Nation Department of Justice, with him on the brief), Window Rock, Navajo Nation (AZ), for Defendants-Appellees.

Before EBEL, McKAY, and BRISCOE, Circuit Judges.

McKAY, Circuit Judge.

Plaintiff-Appellant is a non-Indian New Mexico corporation operating several businesses–including a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and RV park-on property held in fee simple but completely surrounded by Navajo Nation Reservation trust lands. This case involves Appellant's challenge to a Hotel Occupancy Tax enacted by the Navajo Nation, Navajo Nation Code tit 24, §§ 101-142 (1995), requiring persons (Appellant's guests in this case) to pay an eight percent tax on any room or space costing two dollars or more each day in a hotel which is located within the exterior boundaries of the Navajo Nation.[1] *Id.* at §§ 102-103. Appellant initiated its complaint against the tribe in 1993 in a declaratory judgment action brought in the United States District Court for the District of New Mexico. *See Atkinson Trading Co. v. Navajo Nation*, 866 F.Supp. 506, 507 (D.N.M. 1994). The court in that case dismissed the action without prejudice requiring that Appellant exhaust its remedies in the tribal system. *See id.* at 512-13. After receiving an adverse result in the Navajo tribal system,[2] Appellant again brought a declaratory judgment

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[1] We note that when Appellant first brought its challenge in 1993, the rate of the tax was five percent. As originally enacted in 1992, the Hotel Occupancy Tax assessed five percent of the price paid for a room but provided that "[o]n January 1, 1994, the rate of the tax imposed by this chapter will increase to eight percent." Navajo Nation Code tit. 24, § 103 (1995).

While the tax applies only to Appellant's guests, it requires that Appellant collect the tax, *see id.* §§ 104, 107, and provides a reimbursement for the costs of collecting. *See id.* § 109.

[2] The Navajo tribal code provides for appeal from the assessment of the Hotel Occupancy Tax. The prescribed procedure requires a first appeal to the Navajo Tax Commission and permits a second appeal to the Navajo Supreme Court which is empowered to affirm, reverse, remand, or modify a Commission action. *See* Navajo Nation Code tit. 24, § 131(A)-(B)

action in the district court requesting a ruling that the Navajo Nation has no jurisdiction to impose its Hotel Occupancy Tax on Appellant's guests. *See Atkinson Trading Co. v. Gorman et al.*, No. 97-1261 BB/LFG (D.N.M. Aug. 21, 1998); R., Vol. III at 913. Appellant moved for trial de novo and summary judgment. The district court denied Appellant's motions and granted instead Appellees' cross-motion for summary judgment. *See id.* Appellant now appeals the district court's rulings. We exercise jurisdiction under 28 U.S.C. § 1291.

I.

As a preliminary matter, we consider the district court's denial of Appellant's motion for trial de novo. Appellant argues that it should have received a new trial in the district court because the factual findings established in Appellant's appeal to the Navajo tribal system were not supported by the evidence and because the Navajo Supreme Court demonstrated bias in its proceedings. The standard of review for a district court's refusal to grant a new trial is abuse of discretion. *See Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1193 (10th Cir. 1997).

The district court applied the standard set forth in *Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996), to Appellant's declaratory judgment action. In *Mustang*, we adopted the reasoning of the Ninth Circuit from *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (9th Cir. 1990), and held that "when reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts' findings of fact for clear error and

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(1995). The Commission concluded that Appellant was subject to the provisions of the tax, *See* R., Vol. I at 404, and the Supreme Court also ruled against Appellant, affirming the decision of the Commission. *See* R., Vol. II at 705.

conclusions of law de novo." *Mustang*, 94 F.3d at 1384. Appellant complains that our holding was too deferential to decisions of tribal courts and argues that *Mustang* is no longer good law in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *See* Appellant's Br. at 36. Appellant asserts that *Strate* overruled the reasoning of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and, by implication, the reasoning of *Mustang* and *FMC*. *See* Appellant's Br. at 36.

Strate, however, reiterated the holding of *National Farmers Union* and specifically upheld its reasoning. In *National Farmers Union*, a Montana school district and its insurer brought an action in federal district court challenging a tribal court's assertion of jurisdiction over a personal injury action initiated against the school district on behalf of an Indian minor. The Supreme Court ruled that federal courts have the authority to determine whether a tribal court has exceeded the limits of its jurisdiction, *National Farmers Union*, 471 U.S. at 853, but the Court instructed federal courts to follow a deferential exhaustion rule that gives examination of the jurisdictional question in the first instance to the tribal court. *Id.* at 856-57. The *National Farmers Union* exhaustion rule allows a party to challenge in federal court a tribal court's assertion of jurisdiction only after that party has exhausted the remedies available in the tribal court system. The Supreme Court explained the policy behind the rule: "Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856 (footnotes omitted). The Court reasoned that the rule would encourage tribal courts to explain "the precise basis for accepting jurisdiction" and "provide other courts with the benefit of their expertise . . . in

the event of further judicial review." *Id.* at 857. The exhaustion rule would also promote "the orderly administration of justice . . . [that] will be served by allowing a full record to be developed in the Tribal Court" and would minimize the risks of a "procedural nightmare" like the one then before the Court. *Id.* at 856.[3] Referring to policy considerations like these, our circuit adopted the *Mustang* standard of review for decisions of tribal courts. We find nothing in *Strate* to persuade us that the Supreme Court has changed the exhaustion rule or abandoned the reasoning behind it. We therefore conclude that we need not reexamine our decision in *Mustang*.

At issue in *Strate* was "the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members." *Strate*, 520 U.S. at 442. The petitioners in *Strate* wanted the Court to distinguish *Montana v. United States*, 450 U.S. 544 (1981), and extend the holding of *National Farmers Union* to establish a sweeping boundless form of tribal jurisdiction over disputes involving nonmembers. *See Strate*, 520 U.S. at 447. The Court declined to extend *National Farmers Union*, concluding instead that *National Farmers Union* and *Montana* were completely compatible. *See id.* at 448. *Montana*, the Court explained, addressed the larger "concept of 'inherent sovereignty'" and the bounds of tribal power which were at issue in *Strate*. *Id.* at 453 (quoting *Montana*, 450 U.S. at 563). The *National Farmers Union* decision and its deferential rule did "not expand or stand apart from *Montana*'s instruction on 'the inherent sovereign powers of an Indian tribe.'" *Id.* (quoting *Montana*, 450 U.S. at 565). The *Strate* Court set

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[3] For a complete explanation of the "procedural nightmare" that developed, *see National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 560 F. Supp. 213, 213-18 (D. Mont. 1983), reversed 736 F.2d 1320 (9th Cir. 1984), and *National Farmers Union*, 471 U.S. at 847-49.

forth a general proposition that was "unremarkable" for the purposes of its holding but is actually central to the discussion at hand, that is, "where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Id.* at 453 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)) (alterations in original). Deference lies at the heart of the standard of review established in *Mustang*. Even the *Strate* Court recognized the deference that federal courts owe tribal courts. Significantly, *Strate* left intact the deferential reasoning of *National Farmers Union* and, by implication, the rationale of *FMC* and *Mustang*.

FMC and *Mustang* set forth a clearly erroneous standard of review for factual questions decided by the tribal courts. That standard is built upon the "traditional judicial policy of respecting the factfinding ability of the court of first instance," *FMC*, 905 F.2d at 1313, a policy with theoretical underpinnings similar to those articulated by the Supreme Court in *National Farmers Union*. *See, e.g., National Farmers Union*, 471 U.S. at 856 ("[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed."). The standard of review set forth in *FMC* and *Mustang* is *de novo* for questions of law decided in the tribal system. On that point, the *FMC* and *Mustang* courts expected that tribal courts would provide others "with the benefit of their expertise . . . in the event of further judicial review." *National Farmers Union*, 471 U.S. at 857; *see also FMC*, 905 F.2d at 1313-14. This standard "indicates that federal courts have no obligation to follow [the tribal courts'] expertise, but need only be guided by it." *FMC*, 905 F.2d at 1314. The rationale underlying the *FMC* and *Mustang* standards of review for factual and legal questions decided by the tribal courts still persuades us. We conclude

that *Mustang* is still good law and that the district court in this case did not err in applying the *Mustang* standard to the decisions of the Navajo Supreme Court and Navajo Tax Commission.

Appellant asserts that even if the *Mustang* standard is still good law the district court erred in its application of that standard because it did not apply the *Mustang* exception for unfair and biased Indian tribunals.[4] Appellant argues in particular that the district court should have reviewed the factual findings of the Navajo Supreme Court *de novo* because the statements and findings expressed by the tribal court illustrate the pervasive bias Appellant faced in the Navajo Nation's tribunal system. Appellant's Br. at 39-43. Appellant is primarily concerned with: (1) the Navajo Supreme Court's use of the term "lure" to suggest that Appellant improperly used "Navajo trappings" to attract tourists; (2) the court's unnecessary criticism of the congressional policy behind the General Allotment Act of 1887; and (3) the court's unfounded speculation as to why Appellant ceased hiring Navajos and buying wares from Navajo artisans shortly after it commenced this challenge to the Hotel Occupancy Tax. *See* R., Vol. II at 681-82, 684-85, 699. The district court treated these portions of the opinion as merely erroneous statements of the evidence – ignorable, refutable, and irrelevant as to whether the Hotel Occupancy Tax can be imposed upon Appellant's non-Indian customers.[5]

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[4] Though *Mustang* did not speak to this exception explicitly, it is not difficult to extrapolate from our court's opinion that if a nonmember party exhausting its remedies within the tribal system faces a fundamental unfairness or bias against it, the district court ought not give clear error discretion to the tribal court's findings of facts in its review of the tribal court's decision. *See Mustang*, 94 F.3d at 1384.

[5] With respect to the negative statements regarding the General Allotment Act and congressional policy surrounding it, the district court

See R., Vol. III at 915. The district court concluded that "even accepting [Appellant's] contention that the [Navajo Supreme Court's] opinion makes some erroneous statements of fact that are not supported by the evidence," it "does not come close to exhibiting the type of bias that would justify applying a different standard of review to the tribal court's decision." *Id.* at 916-17. Further, the district court noted that Appellant did not "contest any of the essential facts found by the [Navajo Tax Commission] and relied on by the [Navajo] Supreme Court" and determined there was "no need for a *de novo* trial that would afford [Appellant] a second opportunity to contradict facts that it did not contest in the first proceeding." *Id.* at 916. Based on our review of the record, including the opinion of the Navajo Supreme Court, we cannot say that the district court abused its discretion in failing to apply the *Mustang* exception for unfair and biased Indian tribunals and in denying Appellant's motion for a new trial.

II.

We turn now to Appellant's primary contention—that the district court erred in granting Appellee's motion for summary judgment.[6] "We review the grant or denial of summary judgment *de novo*, applying the same standards as the district court." *Habermehl v. Potter*, 153 F.3d 1137, 1138 (10th Cir. 1998).

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pointed out that those were "no more than restatements of a view held by many Indian and non-Indian scholars."

R., Vol. III at 916.

[6] Appellant also contends that the district court erred in denying its motion for summary judgment. For reasons that will become apparent in our discussion of the district court's grant of Appellee's motion for summary judgment, we need not consider the court's denial of Appellant's motion.

The district court ruled that the tribe's authority to impose the tax on Appellant's hotel guests who were not tribal members arose from the guests' consensual relationship with the tribe.[7] The consensual relationship basis for tribal jurisdiction is an exception to a general rule limiting tribal jurisdiction over nonmembers; both the rule and the exception are detailed in *Montana*, 450 U.S. at 564-66. In reaching its decision, the district court determined: (1) that the hotel guests staying at Appellant's hotel had entered into a consensual relationship with the tribe; (2) the relationship entered into was relevantly related to the tax in question; and (3) the tax was not a disproportionate burden on Appellant's guests. Appellant argues that it is *Montana*'s rule that must apply and not its exception and that the district court erred in "creat[ing] a test that is different from that set forth in *Montana* and *Strate*." Appellant's Br. at 8. Because the primary dispute is whether the standard applied in this case is consistent with that set forth in *Montana* and *Strate*, we turn to this issue first.

A.

In *Montana*, the Supreme Court addressed the extent to which a tribe could exercise civil authority over non-Indians on lands owned in fee by non-Indians but located within the bounds of the tribe's reservation. *See Montana*, 450 U.S. at 547. The Court in that case held that the tribe could not prohibit non-Indians from hunting or fishing on fee lands within its reservation because "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. Continuing with its holding, however, the *Montana* Court noted, "To be sure, Indian tribes retain inherent sovereign power to exercise some

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[7] The Navajo Supreme Court came to the same conclusion in its consideration of Appellant's action. *See* R., Vol. II at 701.

forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* The Court then set out two exceptions in which a tribe could exercise jurisdiction over non-Indians on its reservation. The first exception articulated by the Court permits a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* The second exception allows tribes to exercise inherent sovereign power over the conduct of non-Indians on their reservations when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. In *Strate*, the Supreme Court applied the *Montana* rule of inherent sovereignty and held that a tribal court could not entertain a claim between nonmembers arising out of an accident occurring on a public highway that ran through reservation land because the petitioners failed to show their claim qualified under one of *Montana*'s two exceptions. *Strate,* 520 U.S. at 456-59. *Strate* recognized both the *Montana* rule and its exceptions, and it is the latest example illustrating that a proper *Montana* analysis includes a discussion of whether one of the exceptions applies.

It is significant that we review the *Montana* standard in its entirety as we begin our disposition of this case. Importantly, a full understanding of the application of *Montana*'s exceptions requires special emphasis of the Court's own phrase that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana*, 450 U.S. at 565 (emphasis added). This phrase confirms that tribes may exercise their powers over nonmembers on non-Indian fee lands and clearly undermines the argument that the tribe lacks jurisdiction over Appellant's nonmember guests because Appellant's hotel is situated on fee land within the

reservation. The explicit caveat for tribal jurisdiction over nonmembers even on non-Indian fee lands demonstrates that the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation.

The district court in the case at hand observed that "[i]n both *Montana* and *Strate*, the Supreme Court mentioned the tribes' right to tax certain activities as a matter of inherent sovereign power" but "limit[ed] this power by imposing conditions on it." R., Vol. III at 924. Because the Supreme Court had consistently included taxation in its discussion of the consensual relationship exception to the *Montana* rule, the district court determined to analyze the Navajo tribe's taxing authority under that exception.[8] In its application of the consensual relationship analysis from *Montana*, *Strate*, and other Supreme Court cases involving tribal authority of nonmembers on the reservation, the district court also reviewed *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which addressed the scope of tribal taxing powers.

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[8] The district court did not rule out the possibility that the power to tax might arise from the second "significant-impacts" exception to the *Montana* rule. In fact, the Navajo Supreme Court held as much, concluding that "[t]axation, that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity." R., Vol. II at 702. The district court appeared to condone the Navajo Supreme Court's conclusion, stating that "[c]onsideration of the other half of the *Montana* test, the significant impacts factor, in an appropriate case may be sufficient to allow the tribe to impose its tax." R., Vol. III at 927 n.4. In our review of the district court's opinion in this case, however, the applicability of the second exception to the *Montana* rule is not at issue. We therefore do not address its application to the Navajo Hotel Occupancy Tax.

In *Merrion*, the Supreme Court upheld an oil and gas severance tax imposed on non-Indian lessees extracting oil and natural gas from reservation deposits. The Court reasoned that the lessees ought to be subject to the tribe's taxes because they "avail[ed] themselves of the 'substantial privilege of carrying on business' on the reservation" and "benefit[ted] from the provision of police protection and other governmental services, as well as from '"the advantages of a civilized society"' that are assured by the existence of tribal government." *Id.* at 137-38 (citations omitted). The Court recognized that a tribe's power to tax "is an essential attribute of Indian sovereignty . . . [and a] necessary instrument of self-government and territorial management." *Id.* at 137. The Court explained further that a "tribe's interest in levying taxes on nonmembers to raise 'revenues for essential government programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.'" *Id.* at 138 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980)). In its review of *Merrion* in this case, the district court acknowledged that *Merrion* involved tribal, and not fee, lands on the reservation. The district court concluded, however, that *Merrion*'s discussion was not necessarily limited to cases involving tribal lands because the Supreme Court characterized the tribe's authority to tax non-Indians doing business on the reservation as "an essential attribute of sovereignty" and not merely an extension of a tribe's power to exclude persons from its tribal lands. R., Vol. III at 924-25. Because the instant case involved a tax on commercial activity within reservation boundaries and because that tax was designed to sustain the tribe's services in support of the tourist market, the district court determined that the provision-of-services and benefits-of-a-civilized-society factors in *Merrion* would be relevant to its *Montana* consensual relationship analysis.

The district court also reviewed several other Supreme Court cases demonstrating the complexity of a proper *Montana* analysis, including *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), and *Colville*, 447 U.S. at 156. In *Brendale*, a majority of Supreme Court justices recognized that a tribe's interest in zoning fee lands within a reservation became stronger as the impact of fee land activity on the tribe increased. *See Brendale*, 492 U.S. at 430-31 (opinion of White, J.), 437 & n.2 (opinion of Stevens, J.). In *Cotton Petroleum*, 490 U.S. at 186 & n.17, and *Colville*, 447 U.S. at 156, the Court considered the effects and burdens of state and tribal taxes, discussed the relationship between those taxes and the services provided by the tribe, and directed that lower courts seek to accommodate tribal, state, and federal interests in their analyses of tribal self-government and taxing issues.[9]

After reviewing *Montana*, *Strate*, *Merrion*, and the Supreme Court's other Indian jurisdiction case law, the district court determined that "the real question with respect to tribal-taxation cases and the consensual-relationships test is whether the nonmembers' consensual activity within Indian Country is significant enough to allow the tribe to tax that activity." R., Vol. III at 925. The district court described the test in such cases as "a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of

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[9] The district court also referenced *Cohen's Handbook of Federal Indian Law* which characterized the *Montana* and *Colville* holdings as "recogniz[ing] that tribal power can extend to activities of nonmembers on fee lands [within the reservation] but only if there is a tribal interest sufficient to justify tribal regulation." Felix S. Cohen, Handbook of Federal Indian Law 256 (Rennard Strickland & Charles F. Wilkinson eds., 1982).

jurisdiction." *Id.* at 926. As applied by the district court, that balancing test required an examination of "the nature of the relationship between [Appellant's] guests and the Tribe[] and the extent to which the Tribe provides services to those guests while they are on the reservation, compared to the burden placed on those guests by the [Hotel Occupancy Tax]." *Id.* We are convinced that the district court did not apply a standard to the Navajo Nation's Hotel Occupancy Tax that was different from the one set forth in *Montana*. We believe the balancing test and the factors discussed by the district court in its consensual relationship analysis appropriately apply and complement the Supreme Court's Indian law jurisprudence.

The district court did not discuss, however, what may be the most significant case illustrating the consensual relationship exception as it relates to tribal taxation of non-Indians on fee land-*Buster v. Wright*, 135 F. 947 (8th Cir. 1905). The Supreme Court cited *Buster*, an early Court of Appeals decision, in both *Montana* and *Strate* to illustrate a case in which a tribe may legitimately exercise its inherent sovereign powers to tax the activities of nonmembers who enter consensual relationships with the tribe, even those occurring on non-Indian fee land within the reservation. *See Montana*, 450 U.S. at 566; *Strate*, 520 U.S. at 457. The consensual relationship holding in *Buster* involved merchants and traders who were deemed liable to pay taxes for exercising a taxable privilege—that of conducting business within the boundaries of the Creek Nation. *See Buster*, 135 F. at 949-50, 953-54. The relationship was consensual because the nonmember business owners could "refrain from the [privilege] and . . . [therefore] remain[] free from liability for the [tax]." *Id.* at 949. In its reasoning, the *Buster* court considered the fee status of the land belonging to those nonmember business owners, but, more importantly, the court "place[d] clearly before our minds the character of the Creek

Nation and the nature of the power which it [was] attempting to exercise." *Id.* at 950. In the process of weighing the two positions (those of the nonmember business owners and the tribe), the court held that "the governmental power of a nation is not limited to the occupants of the lands in its country which the nation itself owns, but extends to all the inhabitants of its territory." *Id.* at 952.

The Eighth Circuit upheld the tax at issue in *Buster* because the tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders" is "one of the inherent and essential attributes of its original sovereignty." *Buster*, 135 F. at 950. The fact that the business owners within the borders of the Creek Nation owned their land in fee and the fact that the business transactions took place on fee land did not exempt the noncitizens from Indian jurisdiction. The court wrote that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." *Id.* at 951. It held that "the legal right to purchase land within an Indian nation gives the purchaser no right of exemption from the laws of such nation" and that "merchants and traders who had purchased or were occupying such lots were liable to pay the permit taxes of the tribe." *Id.* at 953-54.

Our review of *Buster* is significant because that case, with its explicit approval by the Supreme Court, clearly rebuts Appellant's primary argument that *Montana*, *Brendale*, *South Dakota v. Bourland*, 508 U.S. 679 (1993), *Strate*, and *Merrion* should be read to establish one rule for assertions of tribal jurisdiction on fee land (*Montana*, et al.) and another rule for tribal land (*Merrion*). The Supreme Court's use of *Buster* demonstrates that there is nothing inappropriate in reading those cases in harmony rather than cacophony.

The contrary reading of Supreme Court case law derives from an unwarranted reliance on a coincidence of facts and

results detached from the reasoning of the Court. In the decisions noted above, the Court did make an issue of the fee status of the land in question. But nothing in them suggested that fee status is a limitation on the power to tax. The cases adverse to tribal jurisdiction merely prohibited either the exclusive restrictions on the use of the land itself or the use of lex loci to establish Indian jurisdiction over a tort case between two nonmember parties that was otherwise unrelated to tribal interests. In *Brendale*, for example, the Yakima Tribe sought to enforce its tribal zoning ordinance upon nonmember fee land even though the tribe's ordinance conflicted with a county zoning ordinance covering the same property. *See Brendale*, 492 U.S. at 416. Reliance on one *Brendale* majority's conclusion that the Yakima Tribe "lacked authority to zone nonmembers' fee land within an area of the reservation open to the general public," *See* Dis. Op. at 8, overlooks the conclusion of a differently comprised *Brendale* majority holding that the Yakima Tribe could, in fact, impose its zoning regulation upon nonmember fee land in the area of the reservation closed to the general public. *See Brendale*, 492 U.S at 441-44 (opinion of Stevens, J.), 468 (opinion of Blackmun, J.). The comprehensive holding of *Brendale* demonstrates again how fee status is simply one factor a court should consider in applying the *Montana* framework and weighing the interests of the nonmembers against those of the tribe but not the determining factor. In *Bourland*, the Cheyenne River Sioux Tribe sought to prohibit hunters not holding tribal licenses from hunting on non-trust lands within the reservation. *See Bourland*, 508 U.S. at 685. The Supreme Court held that the treaty rights on which the tribe relied to assert exclusive jurisdiction had been abrogated. However, the *Bourland* Court left for resolution on remand the issue as to whether a *Montana* exception could be invoked to give the tribe jurisdiction over non-Indians on non-trust lands within the reservation. *See id.* at 695-96. In *Montana* itself, the Court considered only the tribe's authority

to prohibit all hunting and fishing by nonmembers on non-Indian property within reservation boundaries, and not the power to tax. *See Montana*, 450 U.S. at 547. While the *Strate* case did not involve the direct regulation of the use of nonmember fee land, the tribal court of the Three Affiliated Tribes in that case sought to assert jurisdiction over a tort claim between a nonmember plaintiff and nonmember defendants solely because the tort occurred within the boundaries of the reservation. *See Strate*, 520 U.S. at 447. The *Strate* Court distinguished its result from *Buster* by contrasting the nature of the consensual relationships that existed in the two cases; it did not distinguish the two cases with any reference to fee status. *See id.* at 457.

We acknowledge that the results in all four of these cases were adverse to the interests of Indian tribal jurisdiction. We believe, however, that the analysis set forth in these cases and others can be more accurately explained as instances in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations. This case-by-case approach seems clearly to have been the result the *Montana* Court intended when it held on the one hand that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers," but on the other hand that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana*, 450 U.S. at 565 (emphasis added).

Even in cases that were resolved favorably for the tribes, the Supreme Court did not indicate that its decision turned on the point of trust land status. In *Merrion*, for example, the Court ruled that the tribe had the authority to tax transactions occurring on trust land in part because those transactions "'significantly involv[ed]'" the tribe and its members and because "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-

government and territorial management [which] . . . enables a tribal government to raise revenues for its essential services." *Merrion*, 455 U.S. at 137 (discussing the holding in *Colville*, 447 U.S. at 152). In *Colville*, the Supreme Court upheld a cigarette tax imposed on non-Indian customers purchasing cigarettes on trust lands and used *Buster* (which involved transactions between tribal nonmembers occurring on fee lands) to note how "[f]ederal courts . . . have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity." *Colville*, 447 U.S. at 153 (citing *Buster*, 135 F. at 950).

The direction provided by Congress on the issue also indicates a tribal jurisdiction standard that is not based on a distinction between fee and tribal lands. In 1948, Congress enacted 18 U.S.C. § 1151 which defined "Indian Country," and therefore the boundaries of Indian tribal jurisdiction, to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." *See DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). Although this definition was codified in the context of a primarily criminal statute, our circuit has held that "Indian tribes have jurisdiction over lands that are Indian country" and that § 1151, which defines Indian country, "applies to civil jurisdiction as well [as criminal jurisdiction]." *Mustang*, 94 F.3d at 1385 (citing *DeCoteau*, 420 U.S. at 427 n.2). In a 1962 case, the Supreme Court held that the enactment of § 1151 "squarely put to rest" the issue of whether land owned in fee fell outside tribal jurisdiction. *Seymour v. Superintendent of Wash. State Pen.*, 368 U.S. 351, 357 (1962); *see also Hagen v. Utah*, 510 U.S. 399, 425-26 (1994) (Blackmun, J., dissenting) (noting that as a result of 18 U.S.C. § 1151, "[r]eservation boundaries, rather than Indian title, thus became the measure of tribal jurisdiction"); *United States v. Baker*, 894 F.2d 1144, 1149 (10th Cir. 1990) (quoting *Seymour* to settle the issue "whether private property

owned by non-Indians but situated within the boundaries of an Indian reservation is still 'Indian country' for jurisdictional purposes"). For this reason, the "chain of events that led to Appellant's land falling within the exterior boundaries of the [Navajo] Nation's reservation," Dis. Op. at 1, is essentially irrelevant. The key issue is the fact that the land is, without dispute, in Indian Country. Rather than support Appellant's artificial dichotomy, § 1151 clearly precludes it. There is simply no authority for the position that the timing of a fee patent makes any difference in designating land on the reservation as Indian Country. To the contrary, Congress, in the exercise of its plenary authority, has determined that all lands within the outer bounds of the reservation are within Indian Country and are therefore subject to reasonable tribal authority.[10]

Because the issue is settled as to whether fee lands within the exterior boundaries of the reservation fall under the jurisdiction of the tribe, the only issue involved in this case is whether the tribe's jurisdictional powers include the right to impose the tax at issue on nonmembers lodging on Appellant's fee lands. Because the power to tax derives from the inherent powers of the tribe, not from the tribe's power to exclude, the status of the land involved as fee land or tribal land is simply one of the factors a court should consider when determining whether a tax on nonmember activity on the

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[10] In fact, the *Montana* Court indicated that its decision to deny the Crow Tribe power to regulate hunting and fishing on fee lands within the reservation might have been different had the statute at issue incorporated a reference to § 1151. The Court stated, "If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians [in its statute that prohibited unauthorized hunting, trapping, or fishing on tribal lands, 18 U.S.C. § 1165], it could have easily have done so by incorporating in § 1165 the definition of 'Indian country' in 18 U.S.C. § 1151." *Montana*, 450 U.S. at 563.

reservation falls within the civil jurisdiction of the tribe.[11] *Cf., e.g., Brendale*, 492 U.S. at 432, 441 (invalidating the tribe's assertion of exclusive zoning authority over fee lands in the "open" portion of the reservation because the proposed development in that area "d[id] not imperil any interest of the Yakima Nation," but granting the tribe exclusive zoning authority over fee lands within the "closed" portion of the reservation–i.e., that portion of the reservation closed to the general public—because the proposed development would endanger economically important timber production and threaten cultural and spiritual values of unique and undeveloped character of land). *Buster* and *Merrion* use similar language and similar analysis in their consideration of tribal taxing powers on activity taking place on fee lands and tribal lands, demonstrating the soundness of the district court's conclusion in this case: "[T]he extent to which a tribe will be allowed to regulate or affect non-Indian activity is often determined on a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction." R., Vol. III at 926.

Contrary to the dissent's suggestion, *See* Dis. Op. at 9, the Supreme Court in *Montana* did not circumscribe the significance of its citation to *Buster* (with a parenthetical

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[11] The dissent mistakenly asserts that our opinion "concludes it is irrelevant whether the nonmembers' conduct takes place on tribal land or non-Indian fee land." Dis. Op. at 6. Our position is not that fee status is irrelevant. Fee status is largely inconsequential in this case simply because the Navajo Hotel Occupancy tax is not a severe imposition upon Appellant's guests and because the subject matter of the tax was more a commercial transaction than one affecting the actual use of Appellant's land. In sum, fee status is plainly relevant in applying the *Montana* standard and its exceptions, but it is not determinative to the extent that the analysis of the Supreme Court turns on that point alone.

phrase, for example). The mere fact that the Court cited to page 950 of the *Buster* decision in no way implies that it did not approve of language from 951 of *Buster* holding that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." *Buster*, 135 F. at 951. The latter language is simply part of the same discussion that the *Buster* court began on page 950 to "place clearly before our minds the character of the Creek Nation and the nature of the power which it is attempting to exercise." *Id.* at 950.

In *Strate*, the Supreme Court made *Buster*'s applicability abundantly clear by including parentheticals to explain its use of *Buster* and other cases to "indicate[] the type of activities the Court [in *Montana*] had in mind" when it expounded the first exception to the *Montana* rule. *Strate*, 520 U.S. at 457. The parenthetical in *Strate* explains that the *Buster* court "up[held] [the] Tribe's permit tax on nonmembers for the privilege of conducting business within [the] Tribe's borders" and "characterized as 'inherent' the Tribe's 'authority . . . to prescribe the terms upon which noncitizens may transact business within its borders.'" *Id.* By pointing out both the consensual relationship between the tribe and nonmembers and the inherent qualities of a tribe's authority to tax in its use of *Buster* to illustrate the first exception to the *Montana* rule, the Supreme Court in *Strate* refutes the dissent's suggestion that *Buster* is applicable only to illustrate what constitutes a consensual relationship. Furthermore, the dissent fails to explain how *Strate* or other Supreme Court cases limit the authority at issue in *Buster* which the Court described as "inherent"the authority "to prescribe the terms of business within its borders." *Id.*

Appellant attempts to distinguish *Buster* by arguing that the Creek Nation imposed its tax on nonmembers two years before the tribe "lost its unlimited sovereign power to regulate the conduct of nonmembers within its territory."

Appellant's Reply Br. at 7. We reject this characterization of *Buster*. While the Creek Nation did enter into an agreement with the United States in 1901 to permit nonmembers to purchase lots within its territory, *see Buster*, 135 F. at 951, that agreement did not compromise the tribe's sovereignty. The Court in *Buster* noted, "The theory that the consent . . . to the conveyance of the title to lots or lands within [the tribal territory] . . . exempts the . . . owners or occupants of such lots from the exercise of all [the tribe's] governmental powers . . . is too unique or anomalous to invoke assent." *Id.* at 952.

In additional attempts to distinguish this case from *Buster*, Appellant argues that in *Buster* "the non-members doing business within the Creek territory had actually purchased the land on which they were doing business directly from the tribe" and "the non-members had been aware of the tax and expressly agreed to it when purchasing their property." Appellant's Reply Br. at 7-8. These arguments do not provide any grounds for distinguishing the case at hand, however. In response to the first point, we acknowledge that the nonmembers in *Buster* did purchase their lots directly from the Creek Nation upon approval by the Secretary of the Interior, whereas Appellant's land was granted to Appellant's predecessor by the United States government. While Appellant might plausibly construe these facts to argue that in *Buster* the nonmembers "were in the tribe's territory with the express permission of the tribe," *Id.* at 8, the difference is insignificant. The critical facts in *Buster* were that the nonmember businesses were located within the boundaries of the Creek Nation and had entered into a consensual relationship with the tribe by exercising the taxable privilege of trading within those boundaries. As we stated above, Congress extinguished any distinction we might draw between *Buster* and the case at hand first, in 1934 when it extended the boundaries of the Navajo reservation by congressional act to include Appellant's fee land, Act of June

14, 1934, ch. 521, 48 Stat. 960-62 (1934), and again, in 1948 when it defined Indian country to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." 18 U.S.C. § 1151; *see also Seymour*, 368 U.S. at 357. For legal purposes, the nonmembers in *Buster* and the Appellant in this case are identically situated on fee l and within the boundaries of the tribe's reservation.

Appellant's second point is more plainly mistaken. To support its contention that the nonmembers in *Buster* had been aware of the tax and expressly agreed to it when purchasing their property, Appellant cites *Buster*, 135 F. at 954. In that portion of the opinion, the court did discuss "contracting parties" who were aware of the tax before entering an express agreement on that point. *Id.* The parties spoken of, however, are not the nonmember businessmen and the tribe. Rather, they are the United States and the Creek Nation. *See id.* The agreement mentioned is the agreement of 1901 between the United States and the Creek Nation that opened the way for nonmembers to purchase fee lots, not an agreement between any individual nonmember merchant and the tribe. *See id.* The dissent appears to perpetuate this error by presuming that "the consensual relationship in *Buster* was formed when the nonmembers purchased tribal land and/or when they chose to transact business with the tribe and its members." Dis. Op. at 9 n.1. It is important to note, however, that the *Buster* court made no mention of any particular agreement, contract, or choice entered into by the nonmember businessmen constituting an express consensual relationship. In fact, the only description of the consensual relationship given in *Buster* is that "[t]he payment of this tax is a mere condition of the exercise of th[e] privilege [of trading within the borders of the Creek Nation]." *Buster*, 135 F. at 949. The *Buster* court noted that "[n]o noncitizen is required to exercise the privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other. . . .

[The tax] has the optional feature of [a license] and lacks the compulsory attribute of [an ordinary tax]." *Id.* Indeed, the only mention of explicit consent in *Buster* was that the tribe did not forfeit their sovereign powers over nonmembers on fee land within its borders by consenting to incorporate cities and otherwise convey lots to those nonmembers. *See id.* at 952.

Buster's discussion of tribal sovereign powers is really no different from the Supreme Court's discussion in *Montana* and elsewhere. In 1831, the Supreme Court declared Indian people's status as "domestic, dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Since that time, the tribes have remained distinct political entities, retaining their original sovereign authority to the extent Congress and the Supreme Court have permitted. *See Montana*, 450 U.S. at 565 (reviewing Supreme Court case law that stresses "that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns"); *Buster*, 135 F. at 950. This case is not distinguishable from *Buster* on the grounds that the tax in *Buster* was imposed in a time of unlimited sovereign powers. Tribal sovereign powers have always had some limitation. The issue here is what those limits are, i.e., whether the Navajo Nation may impose its tax on the non-Indian guests visiting Appellant's hotel situated on fee land within the boundaries of the Navajo Reservation.

Montana and *Strate* mandate that we permit the Navajo Nation to tax Appellant's guests if the tax falls within the consensual relationship exception. Significantly, both cases cite *Buster* to illustrate the consensual relationship exception. *See Montana*, 450 U.S. at 566; *Strate*, 520 U.S. at 457. We are persuaded that the district court's analysis conforms to the Supreme Court's decisions in *Montana*, *Strate*, and *Merrion*, and is consistent with its citations of *Buster*.

Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor of the *Montana* standard and leaves the Supreme Court's Indian law jurisprudence more cohesive and intelligible. The primary considerations that the Supreme Court has taken into account in cases involving tribal jurisdiction and nonmembers on the reservation are (1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting to exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved. Any accounting of fee status either falls into the Court's study of these factors or becomes secondary. We therefore conclude that the district court was correct in applying the consensual relationship exception to the Navajo Nation's Hotel Occupancy Tax as applied to Appellant and its guests.[12] A review of the record as it

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[12] Appellant argues that because the Hotel Occupancy Tax requires both Appellant and its guests to take certain actions, the Navajo Nation must establish jurisdiction over both Appellant and its guests. *See* Appellant's Br. at 15. While the Navajo Supreme Court held that under *Montana* the tribe had the authority both to impose its Hotel Occupancy Tax on Appellant's non-Indian guests and to require that Appellant collect and remit the tax, *see* R., Vol. II at 705, the district court applied its *Montana* rule analysis as if the only issue were the Nation's assertion of jurisdiction over Appellant's hotel guests. *See* R., Vol. III at 920, 929. The question is not really as significant as Appellant suggests. The district court found that the Nation had authority to impose the tax on the guests under the *Montana* consensual relationship test. We note simply that if there is a sufficient consensual relationship between the Nation and Appellant's guests, there is certainly a sufficient consensual relationship between the Nation and Appellant, which, as a corporation operating several businesses on the reservation, has a consensual relationship more explicit than its guests, benefits far more from the provision-of-services and benefits-of-a-civilized-society factors discussed by the district court,

supports the district court's application of facts to the three factors it derived from its *Montana* analysis will help illustrate our conclusion in this regard.

B.

Appellant argues that even if the district court's review of the *Montana* rule and its exceptions were correct, the court erred in its application of the consensual relationship exception. More particularly, Appellant contends that the district court erred in concluding that a consensual relationship existed between the tribe and the hotel guests and in basing that conclusion at least partially on the grounds that the hotel guests drive on a public highway that passes over reservation land to reach Appellant's businesses on fee land within the reservation. *See* Appellant's Br. at 22, 24. Appellant's arguments are again mistaken.

The district court did consider in its consensual relationship analysis the fact that Appellant's guests travel by public highway onto the reservation in their visit to Appellant's establishments (also known as the Trading Post). R., Vol. III at 917, 927. If that were the only factor the district court took into consideration when making its determination, its conclusion would probably be foreclosed

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and is actually reimbursed for the costs of collecting the tax. *See* Navajo Nation Code tit. 24, § 109 (1995).

The district court did question the extent to which Appellant had standing to challenge the Hotel Occupancy Tax, noting that Appellant's standing was "not entirely clear." R., Vol. III at 919. The court reasoned, however, that because the Navajo Nation failed to raise the issue, it failed to give Appellant opportunity to establish standing in the factual record, and the court did not address the issue further. *Id.* at 919-20. Because the Navajo Nation requires Appellant to collect the tax and because those most affected are Appellant's guests, we have no reason to suppose that Appellant lacks standing.

by the Supreme Court's holding in *Strate*. *See Strate*, 520 U.S. at 442 (holding that a tribal court may not entertain an action against a nonmember arising out of an accident occurring on a portion of a public highway that runs across the tribe's reservation). The district court, however, addressed several more significant aspects of the guests' relationship with the tribe. It discussed the extent of police, fire, emergency medical, and tourist services provided by the tribe to benefit Appellant and its guests at the Trading Post.[13]

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[13] Reviewing the Navajo Tax Commission's factual findings, the district court reported:

> Plaintiff's customers travel on reservation land to reach the Trading Post, either on a federal highway or a state highway. These highways pass over rights-of-way granted by the Tribe. The highways are jointly patrolled by the Arizona state, and Navajo tribal, police, but the tribal police force is the primary provider of police protection to the Trading Post and the immediate vicinity. A substation of the Tribe's Tuba City police department is located in Cameron [the town in which Appellant's Trading Post is located]. When a 911 call is placed from the Post, the call is referred to the tribal police for first response. In addition, the Post has an alarm system that triggers calls to the tribal police. That is, when the alarm goes off, the operator of the alarm system calls the tribal police, rather than a non-tribal law enforcement office, to request a response. The Trading Post has a non-loitering policy, and tribal police enforce that policy by requiring juveniles and others that are "hanging out" to move off the Post's property. Tribal police provide assistance to motorists on the highways leading to the Trading Post, including giving directions and changing flat tires.
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> Fire protection in the area of the Trading Post is provided jointly by the tribal fire department in Tuba City, located about 25 miles from Cameron; the Bureau of Indian Affairs ("BIA") fire department (also located in Tuba City); a fire department called the Timberline department that is located 45 miles from Cameron; and the Grand Canyon fire department, located over 50 miles from Cameron. The tribal and BIA departments cooperate closely with each other, and provide the primary response to calls from the Cameron area. There has been at least one fire at the

It ruled that by frequenting Appellant's businesses on the reservation, staying overnight, and otherwise taking advantage of tribal services and the "establishment of a civilized society" on the reservation, those subject to the Navajo Hotel Occupancy Tax had actually entered into a consensual relationship with the tribe. *See* R., Vol. III at 927. In support of its ruling, the district court cited an analogy from New Mexico state law in which motorists driving in New Mexico are deemed to have given implied consent to breath tests for alcohol. *Id.* (citing N.M. Stat. Ann. § 66-8-107 (Michie 1998)). While it does not address directly the issue of implied consent, the court could also have cited New Mexico Statutes Annotated § 3-38-15 (Michie 1999 Supp.), which authorizes municipalities in New Mexico to impose an occupancy tax for revenues on lodging within their municipality in part because "[e]very vendor who is furnishing any lodgings within a municipality or county is

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Trading Post, to which the tribal fire department as well as the Timberline department responded.

Emergency medical services in the Cameron area are provided by a tribal entity called the Emergency Medical Services Department ("EMS"). EMS maintains two ambulances in Tuba City. EMS responds to all calls from locations within the Navajo Nation, and has responded to numerous calls concerning automobile accidents in the Cameron area. The tribal police and fire departments have also received and responded to many auto accident calls in the area, involving both Navajos and non-Navajos. If the state police called Flagstaff emergency services instead of the tribal EMS, however, the Flagstaff unit would respond to the call.

The Navajo Nation has a tourism department that provides information to prospective visitors over the telephone or through brochures. That department is also attempting to stimulate tourism by developing "vendor villages" in several locations on the reservation that receive heavy tourist use, including the Cameron area.

R., Vol. III at 917-19 (footnote omitted); *see also* R., Vol. I at 393, 397-401 (the Navajo Tax Commission's findings of fact).

exercising a taxable privilege." The state of Arizona (where Appellant's Trading Post is located) also levies a "transaction privilege tax" on transient lodging. Ariz. Rev. Stat. §§ 42-5008, -5010, -5070 (1999). The occupancy taxes authorized in Ariz. Rev. Stat. § 42-5010 and N.M. Stat. Ann. § 3-38-15 are applied to lodgers within Arizona and New Mexico municipalities in the same manner as the Navajo Hotel Occupancy Tax applies to Appellant's lodgers on the Navajo Reservation.

The Navajo Nation in the case at hand is taxing the guests of Appellant's hotel for the privilege of remaining on the reservation under the protection and accommodation of the services provided by the tribe. By enacting its Hotel Occupancy Tax, the Navajo Nation seeks to prescribe the terms of business between hotel owners and guests within its tribal borders. *Cf. Strate*, 520 U.S. at 457 (affirming *Buster*'s holding that "the Tribe's 'authority . . . to prescribe the terms upon which noncitizens may transact business within its borders" was "'inherent"'). The consensual relationship between the guests and the tribe is one of implied consent, or privilege and tax, similar to that set forth in *Buster*: the consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability for the Navajo Hotel Occupancy Tax. *Cf. Buster*, 135 F. at 949.

The district court's ruling with regard to the consensual relationship between the tribe and the hotel guests subject to the Hotel Occupancy Tax does not offend the *Montana* consensual relationship exception or other notions of justice. The *Montana* exception contemplates the fact that "commercial dealing . . . or other arrangements" may give rise to tribal jurisdiction under the consensual relationship exception. *Montana*, 450 U.S. at 565. In the case before us, the tribe accommodates the activity of Appellant and its

guests on the reservation. That activity is relevantly related to the tribe's tax. We agree with the district court that, by making the trip to the reservation and staying overnight, "the guests voluntarily put themselves in the position of possibly needing assistance from tribal personnel. . . . In sum, the Tribe provides [Appellant's] overnight guests with the 'benefits of civilized society' while the guests are present, and the presence of the guests creates a greater need, both actual and potential, for tribal services." R., Vol. III at 927-28.

We conclude that the same principles apply as in those other cases in which hotel occupancy taxes have been subject to judicial review. *See* Noralyn O. Harlow, Annotation, Tax on *Hotel-Motel Room Occupancy*, 58 A.L.R.4th 274, 282 ("Hotel room occupancy taxes have been subject to a number of constitutional challenges which, with a few exceptions, have been rebuffed in the courts."). As long as it does not appear that the hotel occupancy tax imposed by the tribe is an "arbitrary or capricious . . . exercise[] of legislative power" and as long as the "benefits received and the burdens imposed [are not] disproportionate," *Id.* at 290-91, 297, a court may infer that by availing themselves of the services provided by the tribe, hotel occupants like those in this case enter into a consensual relationship with the tribe. *See id.* (reviewing cases holding that the imposition of a hotel occupancy tax does not "discriminate against nonresidents and therefore [does] not violate the equal protection clause of the Constitution" and is not an arbitrary or capricious exercise of legislative power so long as the benefits received and the burdens imposed are proportionate).

In the final step of its analysis, the district court considered "the extent to which the Tribe provides services to those guests while they are on the reservation, compared to the burden placed on those guests by the [Hotel Occupancy Tax]." R., Vol. III at 926. The court determined the burdens

of the Navajo Nation's tax were "minimal" because "[u]nlike zoning restrictions or hunting and fishing regulations, which directly restrict nonmembers' ability to act or use their property in certain ways, the [Hotel Occupancy Tax] involves only the payment of a tax of 8% of the room rate." *Id.* at 928. In its discussion of zoning, fishing, and hunting regulations, the district court distinguished this case from the factual scenarios of *Montana*, which involved a tribe's attempt to prohibit the hunting and fishing by nonmembers on fee land within the reservation, *See Montana*, 450 U.S. at 566, and *Brendale*, which involved a tribe's attempt to impose exclusive zoning authority over fee lands within "closed" and "open" portions of the reservation. *See Brendale*, 492 U.S. at 432, 441. We agree with the district court's analysis and hold that this tax is neither an arbitrary and capricious exercise of power nor a disproportionate burden on those paying the tax. *See id.* at 290-91.[14]

In the one case discussed in the A.L.R. report above in which a court found that the burden was disproportionate, a county had imposed an occupancy tax on all hotels in the surrounding municipalities to fund a city convention center. The court found that "the class taxed are afforded no benefits whatsoever, while being significantly burdened." *Allegheny County v. Monzo*, 500 A.2d 1096, 1104 (Pa. 1985). This is not so in the case at hand. The Navajo Hotel Occupancy Tax "is imposed for the purposes of promoting tourism and tourism development," a benefit to Appellant and its guests,

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[14] While several cases use various nomenclature to describe the precise nature of the tax in question, we do not find it necessary to construe the Navajo Hotel Occupancy Tax for purposes of our holding. *Cf.* Harlow, *supra*, 58 A.L.R.4th at 282 (noting that "[t]he variety of nomenclature reflects an equally diverse judicial view of the nature of the tax, which has been held under various circumstances to be a sales tax . . . a privilege tax . . . a license tax . . . an income tax . . . or an excise tax").

and "to develop projects throughout the Navajo Nation." Navajo Nation Code tit. 24, § 142(A)-(B). The district court noted that "the rate [of the Navajo Hotel Occupancy Tax] is lower than the occupancy-tax rate imposed by many municipalities"[15] and observed that Appellant "made no attempt to argue that there was a great disparity between the amount of the tax paid and the services provided by the Tribe." R., Vol. III at 928. We are again persuaded by the district court's analysis. The burden imposed on Appellant's guests is not disproportionate to the benefits they receive by availing themselves of Navajo tribal services, including tourist services. The Navajo Nation's tax is imposed on nonmembers who have entered an implied consensual relationship with the tribe and is used in ways that appropriately benefit the taxpayers.

We hold that as applied to Appellant's guests, the Navajo Hotel Occupancy Tax falls under the consensual relationship exception of the *Montana* rule. The district court's rulings are AFFIRMED.

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[15] The district court appears to have made this conclusion based on a review of occupancy tax rates outside the states of New Mexico and Arizona. The statute authorizing municipalities in New Mexico to impose an occupancy tax limits that tax to "five percent of the gross taxable rent." N.M. Stat. Ann. § 3-38-15 (Michie 1999 Supp.). Arizona levies a five and one-half percent tax on transient lodging. *See* Ariz. Rev. Stat. § 42-5010(A)(2) (1999). Statutes in other states, however, authorize occupancy taxes at rates varying between one and fifteen percent. *See, e.g.*, La. Rev. Stat. Ann. § 2740.18 (A)(1) (West 1999) (authorizing parishes to impose a one percent occupancy tax); Tex. Tax Code Ann. § 351.0025(b) (authorizing an occupancy tax up to fifteen percent of price paid for room) (West 1999); Vt. Stat. Ann. tit. 32, § 9242(c) (1998) (levying a tax of nine percent on occupancies in the state); Va. Code Ann. § 58.1-3819 (Lexis 1999) (authorizing more populated counties to impose an occupancy tax of up to five percent).

BRISCOE, Circuit Judge, dissenting:

I respectfully dissent. For the reasons outlined below, I conclude the Navajo Indian Nation lacks authority to impose the challenged Hotel Occupancy Tax on Appellant's non-Indian guests, and would reverse and remand with directions to enter judgment in favor of Appellant.

I.

Although the majority has recited a few of the historical facts giving rise to this dispute, it has downplayed the chain of events that led to Appellant's land falling within the exterior boundaries of the Nation's reservation. Further, the majority has largely ignored the tribal court proceedings that preceded the filing of this case. I begin by providing additional relevant facts on these points.

Appellant is a New Mexico corporation with its principal place of business in Gallup, New Mexico. Appellant owns certain real property (the Property) in or near Cameron, Arizona (specifically described as Lots 2, 3, and 4 of Section 22, Township 29 North, Range 9 East of the Gila and Salt River Base and Meridian, Coconino County, Arizona). Appellant holds title to the Property in fee simple, and its title can be traced directly to a patent issued by the United States government. One of Appellant's predecessors in title (Hubert Richardson) began business operations on the Property in 1916. Appellant currently operates several businesses on the Property, including a hotel, restaurant, cafeteria, gallery, curio shop, store, and RV park (the businesses are collectively known as the Cameron Trading Post).

The Nation is an Indian tribe with its reservation located in portions of Arizona, New Mexico, and Utah. In 1934, Congress extended the Nation's reservation and, from that point forward, the Property has been surrounded on all sides by the reservation. *See* Act of June 17, 1934, 48 Stat. 960. Thus, customers of Appellant's businesses, including guests

of its hotel, must travel through the reservation via U.S. Highway 89 and Arizona Highway 64 (both of which are maintained by the State of Arizona) to reach the Property.

On July 30, 1992, the Navajo Nation Council enacted the Hotel Occupancy Tax (HOT), 24 N.T.C. §§ 700-741, with an effective date of January 1, 1993. The HOT imposes a tax on all persons who pay for the use or possession of a room or space costing $2.00 or more per day in any hotel within the exterior boundaries of the Navajo Reservation. Owners and operators of hotels within the exterior boundaries of the Navajo Reservation are required to collect the tax from their guests, transmit the funds to the Navajo Tax Commission (NTC), and file reports with the NTC. The tax proceeds are allegedly "used to promote tourism and develop tourism-related projects in the Navajo Nation." App. Vol. II, at 680.

On August 27, 1993, Appellant filed an action in the United States District Court for the District of New Mexico, seeking a declaratory judgment prohibiting application of the HOT to its hotel operation in Cameron, Arizona. That action was dismissed without prejudice on June 17, 1994, due to Appellant's failure to exhaust available remedies within the administrative and judicial systems of the Navajo Nation. *Atkinson Trading Co. v. Navajo Nation*, 866 F.Supp. 506 (D. N.M. 1994). Appellant did not appeal that ruling.

On July 22, 1994, Appellant began its trek through the Navajo Nation administrative and judicial systems by submitting a letter to the NTC objecting to application of the tax to rooms rented by Appellant on its property and requesting a refund "of all monies paid . . . pursuant to this Tax." App., Vol. 1, at 1. On September 20, 1994, Ronnye Etcitty, the Executive Director of the NTC, rejected Appellant's request. *Id.* at 4-6. In the letter, Etcitty cited the following reasons why the challenged tax was applicable to Appellant's guests:

> [Appellant] employs at least thirty-five tribal members in its operations at Cameron. [Appellant] purchases Navajo made arts and crafts from members of the Navajo Nation. [Appellant's] operations are significant users of water in the Cameron area. The Navajo Nation government provides police protection, fire protection and other governmental services to the residents and visitors of the area. The Court system of the Navajo Nation is available to [Appellant] to resolve disputes. The advantages of a civilized society are assured by the existence of the Navajo Nation government.

Id. at 4-5. Etcitty's decision was subsequently affirmed by the NTC by a "Conference Decision" dated September 28, 1994. *Id.* at 7.

Appellant filed a notice of appeal from the NTC's decision. *Id.* at 8. On July 24 and 25, 1995, the Navajo Nation Office of Hearing and Appeals held a hearing on Appellant's appeal, at which time both Appellant and the Executive Director of the NTC presented witness testimony and other evidence. *Id.* at 107-392. On November 16, 1995, the NTC issued a written order concluding that Appellant was "subject to the Navajo Hotel Occupancy Tax laws for taxable periods commencing January 1, 1993, and [wa]s properly charged with the collection and remittance of the tax to the Office of the Executive Director of the Navajo Tax Commission." *Id.* at 404. In support of its conclusion, the NTC noted that (1) Appellant benefited from the governmental services provided generally to all persons within the exterior boundaries of the reservation, (2) Appellant's activities and those of its guests had a direct effect on the political integrity, economic security, or health and welfare of the Navajo Nation because the Navajo Nation police, fire, and emergency service units had responded to emergency and non-emergency situations at or near the Property, and (3) the fact that Appellant had previously been

determined by the Ninth Circuit to be an Indian trader "within the meaning of the applicable federal statute create[d] a presumption that its activities ha[d] a direct effect on the political integrity, economic security or health and welfare of the Navajo Nation." *Id.* at 402. The NTC did not make any findings or reach any conclusions concerning whether a consensual relationship existed between the Nation and Appellant's non-Indian guests.

Appellant appealed the NTC's judgment to the Supreme Court of the Navajo Nation. On August 22, 1997, the Navajo Supreme Court affirmed the NTC's decision. The details of that decision will be discussed below. Appellant subsequently filed this action in the United States District Court for the District of New Mexico. After allowing the parties to file cross-motions for summary judgment, the district court entered judgment in favor of defendants, essentially affirming the decision of the Navajo Supreme Court.

II.

It is true that this case arrives before us in the context of the district court's grant of summary judgment. It must be remembered, however, that the district court's ultimate task was to review the Navajo Supreme Court's determination regarding tribal jurisdiction. *See Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996) (reviewing tribal court's decision regarding tribal jurisdiction to impose severance tax on oil and gas produced from lands allotted to individual tribal members). For purposes of this appeal, our task is identical to that of the district court: we must determine whether the Navajo Supreme Court was correct in concluding that the Nation acted within its authority when it imposed the challenged tax. *Id.* In doing so, we review the tribal court's conclusions of law de novo, and any underlying factual findings for clear error. *Id.*

III.

Because this case involves the Nation's authority to regulate the conduct of nonmembers on alienated, non-Indian land within the boundaries of the reservation, it is clear that the analytical framework outlined in *Montana v. United States*, 450 U.S. 544 (1981), and reaffirmed in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), is the proper one to apply. Under that framework, we must first determine whether any applicable treaties or federal statutes afford the tribe such authority. If no such treaties or statutes exist, the tribe is presumed not to have civil authority over the nonmembers unless one of the two exceptions outlined in *Montana* is found to exist. Under these two exceptions, a tribe has "inherent sovereign power to exercise some forms of civil jurisdiction over" nonmembers if (1) the nonmembers have in any way entered into a consensual relationship with the tribe through commercial dealing, contracts, leases, or other arrangements, or (2) the nonmembers' conduct on fee land within the reservation has threatened or had some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Strate*, 520 U.S. at 446.

Although the majority purports to apply the *Montana* framework, it makes several major missteps in doing so. To begin with, the majority mistakenly concludes it is irrelevant whether the nonmembers' conduct takes place on tribal land or non-Indian fee land. *See* Maj. Op. at 31 ("Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor of the *Montana* standard . . . ."). A proper reading of *Montana* and *Strate* indicates this distinction is, in fact, significant. Both cases involved nonmember conduct on nonmember fee land. At issue in *Montana* was the "power of the [Crow Tribe of Montana] to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." 450 U.S. at 557. In *Strate*, the question was whether tribal

courts could "entertain claims against nonmembers arising out of accidents on state highways" running through Indian reservations. 520 U.S. at 442. Although these factual circumstances compelled the Court to utilize the above-outlined framework to resolve both cases, the Court indicated in both instances that its analysis would be different if the nonmember conduct had occurred on tribal land. For example, in *Montana*, the Court "readily agree[d]" with the lower court's holding "that the Tribe [could] prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." 450 U.S. at 557. Likewise, in *Strate*, the Court noted "that tribes retain considerable control over nonmember conduct on tribal land." 520 U.S. at 454. Further, before applying the *Montana* framework, the Court took great pains to establish that the land at issue was functionally equivalent to "land alienated to non-Indians," *Id.* at 456, and it emphasized that the outcome of its *Montana* analysis had no bearing "on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id.* at 442.

Any doubts on this point are negated when one considers the Court's other post-*Montana* cases. In 1982, less than a year after *Montana* was issued, the Court decided *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), involving the authority of the Jicarilla Apache Tribe to impose an oil and natural gas severance tax on nonmembers who had entered into long-term mineral leases of tribal land. With no mention of the *Montana* framework, the Court upheld the Tribe's taxing power as an inherent attribute of tribal sovereignty. In doing so, the Court noted "that '[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.'" *Id.* at 137 (quoting *Washington v. Confederated*

Tribes of Colville Indian Reservation, 447 U.S. 134, 152 (1980)) (emphasis added).

In 1989 and 1993, the Court returned to the *Montana* framework to decide, in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), the Yakima Indian Nation's authority to zone nonmembers' land within the reservation, and, in *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Cheyenne River Sioux Tribe's authority to regulate hunting and fishing by non-Indians in an area located within the reservation but acquired by the United States for the operation of a dam and reservoir. In *Brendale*, a majority concluded that the Yakima Indian Nation lacked authority to zone nonmembers' fee land within an area of the reservation open to the general public. 492 U.S. at 423-24 (opinion of White, J.); *Id.* at 444-45 (opinion of Stevens, J.). In *Bourland*, the Court noted "that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands." 508 U.S. at 689. "The abrogation of this greater right," the Court indicated, likewise "implies the loss of regulatory jurisdiction over the use of the land by others." *Id.* Under the facts before it, the Court concluded that when Congress acquired certain tribal land for the dam and reservoir project, it "eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Id.*

Ignoring these Supreme Court cases, the majority here relies on two unconvincing sources. First, the majority cites language from *Buster v. Wright*, 138 F. 947, 951 (8th Cir. 1905), stating that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it." Although it is true that *Buster* was cited in *Montana* and *Strate*, the Court's purpose in both instances was to provide an example of the first *Montana* exception relating to nonmembers who enter consensual

relationships with a tribe.[16] 520 U.S. at 457; 450 U.S. at 566. In neither case did the Court approve of the language now relied upon by the majority. Indeed, it is clear from *Montana*, *Strate*, and the other post-*Montana* cases cited above that the quoted language from *Buster* is not an accurate statement of current federal law.[17] The second authority cited by the majority is 18 U.S.C. § 1151, which defines the term "Indian Country" to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." Although this definition is often relied upon in determining "the allocation of federal, tribal and state authority with respect to Indians and Indian lands," *Indian Country U.S.A. Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987), it has little, if any, bearing on tribal jurisdiction over nonmembers occurring on nonmember fee land within the boundaries of a reservation. For example, in *Strate*, the Court held that rights-of-way, which are specifically included in § 1151's definition of "Indian country," are to be treated (at least where a tribe has not retained the right to exercise dominion or control over the right-of-way) as non-Indian land for purposes of determining a tribe's civil authority over non-Indians' conduct occurring thereon. Further, in *Montana*, the Court acknowledged the existence of § 1151, but obviously rejected it as a statutory source of tribal jurisdiction over non-Indians on fee-patented lands. *See* 450 U.S. at 562.

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[16] Presumably, the consensual relationship in *Buster* was formed when the nonmembers purchased tribal land and/or when they chose to transact business with the tribe and its members.

[17] The decision in *Buster* was also discussed in *Merrion*. 455 U.S. at 143. That discussion pointed out that a tribe's taxing authority does not derive solely from its power to exclude non-Indians from tribal lands. Nothing in this discussion undermines the distinction, recognized in *Montana* and *Strate*, between tribal land and fee land for purposes of determining tribal jurisdiction over nonmembers.

Based upon its mistaken conclusion that there is no distinction between fee land and tribal land for purposes of determining tribal jurisdiction over nonmembers, the majority in this case proceeds to modify the *Montana* framework with factors derived in large part from *Merrion*. In particular, the majority adopts and applies what it describes as a "balancing test" in which "'the impact of the [nonmembers'] activity on the tribe [is balanced] with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction.'" Maj. Op. at 25-26 (quoting R. Vol. III at 926). Among the key factors considered by the test are whether the tribe provides services to the nonmembers and whether the nonmembers otherwise benefit from "the advantages of a civilized society that are assured by the existence of [the] tribal government." *Merrion*, 455 U.S. at 137-38 (internal quotations and citations omitted).

In my view, it is improper to modify the *Montana* framework with any language or "factors" derived from *Merrion*. *Montana* operates from a presumption that, absent express authority derived from a treaty or statute, a tribe lacks jurisdiction over nonmembers' conduct on nonmember fee land. Only in those limited circumstances where a nonmember has entered into a consensual relationship with the tribe or its members, or where a nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," does a tribe possess inherent sovereign authority "to exercise civil authority over the conduct of non-Indians on fee lands within its reservation . . . ." 450 U.S. at 566; *see also Strate*, 520 U.S. at 446 ("*Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers or non-Indian land within a reservation, subject to two exceptions . . . ."). In contrast, *Merrion* operates from a presumption that a tribe retains inherent sovereign authority to regulate nonmembers'

conduct occurring on tribal land, and thus contains no particular "test" or "factors" for deciding tribal jurisdiction. The majority's newly adopted test, which effectively blends the two cases, subverts the question of whether a consensual relationship exists between the nonmembers and the tribe and replaces it with an entirely different inquiry that, in my view, makes it substantially easier for a tribe to establish jurisdiction over a nonmember.

IV.

Because the majority has not, in my view, properly applied the *Montana* framework in deciding whether the Nation had authority to impose the HOT on Appellant's non-Indian guests, I proceed to do so.

Existence of treaty or statute affording the Nation authority over Appellant's guests

Although the Nation has never expressly relied on any treaty or federal statute to support its alleged authority to regulate Appellant's non-Indian guests, the Navajo Supreme Court concluded that the 1868 Navajo Treaty, 15 Stat. 667 (June 1, 1868), afforded the Nation "sovereign authority over the exterior boundaries of its territory -then and now." App., Vol. II at 685. The Navajo Supreme Court also suggested that this treaty afforded the Nation the authority to exclude Appellant's non-Indian guests from passing through the reservation to reach Appellant's property. *Id.* at 688, n. 8. Finally, the Navajo Supreme Court concluded that the federal Indian country statute, 18 U.S.C. § 1151 et seq., is "the measure of tribal civil authority." *Id.* at 687.

The Navajo Supreme Court's conclusions regarding the 1868 Treaty are clearly undercut by *Montana*. In *Montana*, the Supreme Court emphasized "that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." 450 U.S. at 560. Although the record in this case does not indicate precisely when the patent

for the Property was issued, it appears to be undisputed that it occurred after the 1868 Navajo Treaty was enacted. Thus, the Treaty cannot be read as a statement of Congressional intent affording the Nation authority to regulate conduct occurring on the Property.

Likewise, the fact that the 1868 Treaty may have originally afforded the Nation the right to exclude non-Indians from traveling through the reservation does not, over 130 years later, afford the Nation any authority over Appellant's non-Indian guests. It is uncontroverted that Appellant's guests travel through the reservation via U.S. Highway 89 and Arizona Highway 64, both of which are maintained by the State of Arizona, to reach the property. Like the highway at issue in *Strate*, both of these highways presumably represent rights-of-way granted by the Nation, and there is no evidence in the record that the Nation retained any right to exercise dominion or control over those highways. Accordingly, under *Strate*, the highways must be treated as non-Indian property for purposes of determining the Nation's regulatory authority over Appellant's non-Indian guests.

Finally, contrary to the conclusion reached by the Navajo Supreme Court, the Indian country statute does not provide Indian tribes with any civil authority over non-Indians on fee patent land. As previously explained, although fee patent land falls within the definition of the term "Indian country," nothing in that statute grants tribes authority over non-Indians' conduct on such land.

In conclusion, I find no treaty or federal statute that affords the Nation civil authority over Appellant's non-member guests.[18]

Accordingly, I proceed to determine whether either of the two *Montana* exceptions applies.

Consensual relationship between the Nation and Appellant's guests

As previously stated, the first exception set forth in *Montana* to permit the Nation's exercise of civil authority over Appellant's non-member guests can arise out of a consensual relationship between the Nation and Appellant's guests. Although the Nation does not point to any consensual relationship between itself and Appellant's non-Indian guests,[19] the Navajo Supreme Court concluded that such a relationship existed. The Navajo Supreme Court based its finding on the following factors: (1) Appellant had "availed itself of the substantial privilege of carrying on business within Navajo Nation jurisdiction," (2) Appellant "uses a Navajo Indian environment, including culture, Navajo employees, crafts, and other Navajo Indian trappings, to lure tourists to its facility for business purposes," (3) "[w]hile on [Appellant's] property, the [non-Indian] tourists are served by

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[18] The Nation has not argued, nor do I find, that any grant of regulatory authority can be derived from the fact that Congress enlarged the reservation in 1934 to completely surround Appellant's fee land.

[19] Like the majority, the Nation relies heavily on the Court's decision in *Merrion*, and asserts that it possesses inherent sovereign power to tax all conduct occurring within the geographical boundaries of the reservation, including the conduct of Appellant's non-Indian guests. Under *Montana*, however, it is clear that a tribe's inherent sovereign power to exercise civil jurisdiction over nonmember conduct occurring on nonmember fee land is strictly limited to situations in which one of the two *Montana* exceptions is found to exist. 450 U.S. at 565-66.

Navajo employees, who make up a majority of [Appellant's] work force, to provide a distinctly Navajo flavor," (4) "[s]uppliers enter and drive across the Navajo Nation to bring [Appellant] and its guests goods," (5) Appellant had "purchased arts and crafts from Navajo tribal members and sales have been made to tribal members," (6) Appellant and its non-Indian guests "receive and benefit from many modern Navajo Nation governmental services, or from the advantages of a civilized society that are assured by the Navajo Nation Government," including police and fire protection, medical services, health protection, and tourism services. App. at 699-701.

In my view, at least half of these factors are irrelevant. Because it is uncontroverted that the legal incidence of the HOT falls on Appellant's guests, it is the relationship between those guests and the Nation that is important, not the relationship between Appellant and the Nation. Thus, even assuming, arguendo, there is some type of consensual relationship between Appellant and the Nation, that does not afford the Nation authority over Appellant's guests. I therefore discount entirely the first, second, and fifth factors relied upon by the Navajo Supreme Court.

The evidence in the record does support the third factor cited by the Navajo Supreme Court. Specifically, the evidence indicates that the majority (75 to 80 percent) of Appellant's employees are members of the Nation, and that Appellant's non-Indian guests are routinely served by this group of employees.[20] *See* App., Vol. I at 191, 398. In my view, however, these facts in no way give rise to a consensual relationship between Appellant's non-Indian guests and the

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[20] According to the record, Appellant's non-Indian guests do not, while on Appellant's property, transact business with tribal members not employed by Appellant. App., Vol. I at 130.

Nation. It is a basic principle of agency law that a servant acting within the scope of his or her employment does so on behalf of the master. *See* Restatement (Second) of Agency §§ 1, 2 (1957). Thus, when one of Appellant's Navajo employees performs a service for one of Appellant's guests, he or she is acting as a representative of Appellant, not the Nation. To highlight my point, I note that if one of these same employees injures a guest while acting within the scope of his or her employment, it is Appellant, not the Nation, who is responsible for the injuries. *See id.* § 219(1); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) ("An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment.").

I fail to see the relevance of the fourth factor relied upon by the Navajo Supreme Court, i.e., that suppliers cross the reservation to bring supplies to Appellant and its guests. The evidence in the record indicates that, while guests[21] and suppliers actually travel inside the boundaries of the reservation to arrive at Appellant's property, they do so via U.S. Highway 89 and Arizona Highway 64, both of which are maintained by the State of Arizona. In other words, Appellant's suppliers and non-Indian guests travel on rights-of-way allocated to the federal government and the State of Arizona, and maintained by the State of Arizona, to arrive at Appellant's fee patent land within the exterior boundaries of the Navajo Nation. Nothing from this conduct alone gives rise to a knowing and consensual relationship between Appellant's guests and the Navajo Nation sufficient to afford the Nation the right to regulate Appellant's guests. *See*

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[21] The record indicates that the majority of Appellant's non-Indian guests are tourists traveling to and from the Grand Canyon on tour buses. App., Vol. I at 127-29, 178-79, 395.

Strate, 520 U.S. at 456-57 (concluding there was no consensual relationship between tribe and parties involved in accident on highway that ran through reservation).

As for the Navajo Supreme Court's conclusion that Appellant's non-Indian guests "receive and benefit from many modern Navajo Nation governmental services, or from the advantages of a civilized society that are assured by the Navajo Nation Government," I find little support for this conclusion in the record. Although the Nation provides law enforcement services to Appellant and its guests, the evidence indicates this is largely the result of agreements and understandings among the State of Arizona, the counties surrounding the reservation, and the Nation. Thus, when Appellant or its guests place a 911 call, it is first routed to state or county authorities outside the reservation who decide how to handle it. If and when the Nation's law enforcement officers perform a task involving a non-Indian, they generally do so as officers of the State of Arizona, rather than the Nation. As for fire prevention services, the record indicates that the Nation's fire department is available to assist in extinguishing any fires on Appellant's property. However, the evidence indicates that the Nation's fire department has, at most, reported to only one fire call from Appellant's property, and there is no evidence that the fire involved or threatened Appellant's guests.[22] Finally, there is no evidence

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[22] The evidence regarding this single incident is sketchy. In particular, the evidence suggests that Appellant contacted the Arizona state police, and it is unclear whether it was the Nation's fire department or the Bureau of Indian Affairs' fire department that responded. App., Vol. I at 205-06. In any event, the evidence indicates Appellant has its own firefighting equipment and its maintenance personnel is trained to use the equipment. *Id.* at 136, 180. During a subsequent fire involving an employee housing unit, Appellant's employees extinguished the fire. *Id.* at 253. The Nation's fire department did not respond at all to that fire. *Id.* at 180. Although one

that any of Appellant's non-Indian guests have been provided medical,[23] health protection[24], or tourism services by the Nation.

In the end, the evidence contained in the record is insufficient, in my view, to support the conclusion that a consensual relationship, either express or implied, exists between the Nation and Appellant's non-Indian guests. I conclude the Nation cannot rely on the first *Montana* exception as authority to regulate Appellant's non-Indian guests.

Effect on the Nation's political integrity, economic security, or health and welfare

Again, although the Nation has not asserted any threat or direct effect from Appellant's non-Indian guests on its political integrity, economic security, or health and welfare, the Navajo Supreme Court concluded that such a threat or direct effect existed and justified the exercise of tribal authority under the second *Montana* exception. Specifically, the Navajo Supreme Court concluded as follows:

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of the Nation's police officers apparently responded, the fire had been extinguished by the time he arrived. *Id.* at 253.

[23] Non-Indian guests seeking medical treatment are referred by Appellant to a medical facility in Flagstaff, Arizona, approximately 54 miles away from the Property. App., Vol. I at 126, 135, 180-81.

[24] The NTC found that "[a] variety of health services are offered to members and non-members by the Navajo Nation Division of Health, including health inspection of food vendors on all sites within the Navajo Nation." App., Vol. I at 400. To the extent this finding implicates Appellant's non-Indian guests, it is erroneous since there is no evidence in the record indicating that these health inspection services involved Appellant's operations, or otherwise benefited Appellant's non-Indian guests.

Taxation, that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity. A sovereign nation that cannot raise revenues to conduct governmental operations cannot function. Aside from the need to raise revenue to fund essential governmental services, (citation omitted), taxation is a method of business regulation. A hotel occupancy tax is utilized to determine and project the number of tourist visits each year. Funds are then channeled to those governmental programs which benefit tourists, including police and fire protection, medical treatment, health inspections, tourism information, tourist facilities, and others.

The economic security element is similar. The Navajo Nation is seeking self-reliance and economic security through taxation. The present national trend is to shift the financial obligations of governance and government services from the federal government to the states. Public services which were formerly provided by the federal government are now the states' responsibility. The states can readily assume those obligations because of their strong tax bases. Unlike the states, the Navajo Nation just recently began building its tax base, and the hotel occupancy tax contributes to that foundation.

The Navajo Nation's health and welfare interests are also implicated. The Navajo Nation assumed the responsibility of the Indian Health Service to assure public health in the form of housing code regulation, health inspections, and providing public health services to [Appellant's] guests. The "welfare" interest is used here in the sense of protecting the

> public welfare, as has been previously elaborated in this opinion.
>
> The second *Montana* exception also implicates Indian nation police power. . . . Cameron, Navajo nation (Arizona) is not a "hole" within Navajo Nation territorial jurisdiction. The Navajo Nation has responsibilities to everyone who is present within its jurisdiction.

App. at 702-04.

As is apparent from the above-quoted language, the Navajo Supreme Court's analysis is nonsensical. Nowhere does the court cite to any evidence demonstrating that the conduct, or even the mere presence, of Appellant's non-Indian guests represents a threat to, or has a direct effect on, the Nation's political integrity, economic security, or health and welfare. Instead, the court seems to suggest that the Nation's desire for self-reliance, and its need for governmental funding, justifies the imposition of the HOT on Appellant's non-member guests. This circular reasoning, which could arguably be used to justify any tax on non-Indians on fee patent land, does not satisfy the second *Montana* exception.

Neither the conduct nor presence of Appellant's non-Indian guests threatens or affects the Nation's ability to govern itself and its people. Nor has there been any showing that Appellant's guests in any way threaten or affect the health and welfare of the Nation and its people. Perhaps the best argument that can be made is that the Nation's limited provision of services to Appellant and its guests (e.g., police and fire protection) has a direct effect on the Nation's economic security. More specifically, it is undoubtedly true that the provision of such services costs money and impacts the Nation's budget. However, the evidence presented on this

point was extremely limited, and it is impossible to conclude that the provision of such services threatens or directly affects the Nation's economic security in such a fashion as to qualify for *Montana*'s second exception. *See Strate*, 520 U.S. at 459 (suggesting that the second *Montana* exception is limited to situations where tribal regulatory or adjudicatory authority is needed to preserve the right of reservation Indians to make their own laws and be ruled by them); *Brendale*, 492 U.S. at 431 (White, J.) (under the second *Montana* exception, "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe").

Conclusion

For the reasons outlined above, I conclude the Nation does not have civil authority over Appellant's non-Indian guests. In particular, there is no treaty or federal statute granting the Nation such authority, and the evidence contained in the record is insufficient to demonstrate the applicability of either of the two *Montana* exceptions. I would reverse and remand this case with directions to enter judgment in favor of Appellant.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-2247

ATKINSON TRADING COMPANY, INC.,
A NEW MEXICO CORPORATION,
Plaintiff - Appellant,

v.

JOE SHIRLEY, JR.; VICTOR JOE; DERRICK B. WATCHMAN; ELROY DRAKE; MEMBERS OF THE NAVAJO TAX COMMISSION; STEVEN C. BEGAY, DIRECTOR OF THE NAVAJO TAX COMMISSION,
Defendants-Appellees.

ORDER
Filed June 26, 2000

Before SEYMOUR, Chief Judge, McKay, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO and MURPHY, Circuit Judges.

Atkinson Trading's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. Judge Briscoe voted to grant rehearing and called for a poll of the en banc court. Judges Tacha, Baldock, Brorby and Murphy voted to grant rehearing en banc. As the active judges split five to five in response to the poll, the suggestion for en banc rehearing fails.

Entered for the Court
PATRICK FISHER, Clerk of Court
by:

Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1261 BB/LFG

ATKINSON TRADING CO., INC.
A New Mexico corporation,
Plaintiff,

VS.

NELSON GORMAN, HOMER BLUEHOUSE, KING MIKE, JR., LEANDER BERGEN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Defendants.

MEMORANDUM OPINION

THIS MATTER comes before the Court for consideration of Plaintiff's March 30, 1998 motions for summary judgment and trial *de novo* (Docs. 19 and 21), as well as Defendants' March 30, 1988 motion for summary judgment (Doc. 23). The Court has reviewed the parties' submissions and the relevant law and, for the reasons set forth below, will DENY Plaintiff's motions and GRANT Defendant's motion. Oral argument is not necessary.

Procedural History

This case involves a challenge to a Hotel Occupancy Tax ("HOT") enacted by the Navajo Tribe and applied to Plaintiff's customers. Plaintiff initially challenged the tax in federal court, but the action was dismissed without prejudice because Plaintiff had not exhausted its tribal remedies.

Atkinson Trading Co. v. Navajo Nation, 866 F.Supp. 506 (D.N.M. 1994). Plaintiff then completed the exhaustion process by participating in administrative proceedings, including a trial-type hearing before a hearing officer of the Navajo Tax Commission ("NTC"), and by unsuccessfully appealing the NTC's adverse decision to the Navajo Supreme Court. Following that unsuccessful appeal, Plaintiff filed the instant action for declaratory judgment, requesting a ruling that the Tribe has no jurisdiction to impose the HOT on Plaintiff's overnight guests. As part of this action, the parties have submitted the entire record developed below, including transcripts and exhibits from the NTC proceedings and the appellate record created in the Supreme Court. Based on that record, Plaintiff and the Tribe have filed cross-motions for summary judgment on the jurisdictional issue. Plaintiff has also filed a motion for a trial *de novo,* which the Court will address initially.

Motion for Trial *De Novo*

As Plaintiff acknowledges, the Tenth Circuit has recently decided that in cases such as this, concerning a tribal-court decision asserting jurisdiction over non-members, the proper standard of review is for this Court to review the tribal court's findings of fact for clear error, while applying a *de novo* review to the tribal court's conclusions of law. *Mustang Production Co. v. Harrison* 94 F.3d 1382, 1384 (10th Cir. 1996). Plaintiff's motion for trial *de novo* is an attempt to avoid application of *Mustang*'s deferential standard concerning factual matters. Instead, Plaintiff would have this Court engage in a new fact-finding effort, even though Plaintiff had an opportunity to fully develop all the relevant facts in the administrative proceedings held by the NTC.

Plaintiff makes two main arguments in support of its position. First, according to Plaintiff, this Court should not give deference to the Navajo Supreme Court's findings of fact because several of them were not supported by the

evidence presented at the administrative trial, and because the Supreme Court exhibited bias in its opinion. The Court notes, however, that in addressing this matter the Navajo Supreme Court was acting as a court of review, not a fact-finding court, and therefore any statements of fact made in its opinion are not "findings" that are to be given deference; rather, it is the fact-finder's determinations, the findings made by the NTC, that are entitled to such deference. Any "findings" the Supreme Court may have made that are not supported by the evidence are simply erroneous statements of the evidence presented below, and may be treated as such—that is, ignored or refuted—by this Court.

The Court also notes the "findings" about which Plaintiff complains are irrelevant to the issue presented to this Court. Plaintiff argues that the Supreme Court's opinion makes some statements about the nature of Plaintiff's business that were not supported by the evidence. In particular, Plaintiff complains about the Supreme Court's observation that Plaintiff uses Native American trappings to lure tourists to its establishment. Whether the Court's statements are true or not, they bear little or no weight on the question to be decided in this case, which is whether the HOT can be imposed on Plaintiff's non-Indian customers. Similarly, Plaintiff complains about the Supreme Court's negative statements concerning the General Allotment Act, arguing that those statements are not based on any evidence presented during the trial and that they exhibit the Court's bias. Again, these statements are irrelevant to the issues in this case, and are no more than restatements of a view held by many Indian and non-Indian scholars—that the allotment policy turned out, in retrospect, to be a dismal failure. *See, e.g.*, Felix S. Cohen, *Handbook of Federal Indian Law* 614 (1982 ed.).

In addition, Plaintiff does not contest any of the essential facts found by the NTC and relied on by the Supreme Court. These include the Tribe's provision of police, fire protection,

and other services to Plaintiff's customers, as well as the physical location of Plaintiff's business. There is no need for a *de novo* trial that would afford Plaintiff a second opportunity to contradict facts that it did not contest in the first proceeding.

Plaintiff's second argument against application of the *Mustang* standard of review is a contention that *Mustang* was wrongly decided. Plaintiff recognizes this Court has no power to overrule *Mustang*, but wishes to preserve the issue for possible appellate review. Plaintiff has correctly recognized the limits of this Court's power, and the Court need not address this argument further.

In sum, this Court's reading of the Navajo Supreme Court's opinion is that, even accepting Plaintiff's contention that the opinion makes some erroneous statements of fact that are not supported by the evidence, the opinion does not come close to exhibiting the type of bias that would justify applying a different standard of review to the tribal court's decision than the standard adopted in *Mustang*. The Court will therefore apply the *Mustang* standard in this case.

Motions for Summary Judgment

Facts: The Court has reviewed the transcript of the NTC proceedings, depositions introduced into evidence during those proceedings, the exhibits submitted to the NTC, and the NTC's findings of fact. The facts supported by the foregoing may be summarized as follows. Plaintiff is a non-Indian New Mexico corporation that operates a business, known as the Cameron Trading Post, on fee land located within the boundaries of the Navajo Nation. The establishment is in Cameron, Arizona, a small community northeast of Flagstaff. Plaintiff's property is completely surrounded by reservation trust lands. The Trading Post consists of a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and RV park. These businesses focus on the tourist market and deal almost

exclusively with nonmembers of the Navajo Nation. A significant portion of the Trading Post's business is provided by tour buses that stop overnight either before or after visiting the Grand Canyon.

Plaintiff's customers travel on reservation land to reach the Trading Post, either on a federal highway or a state highway. These highways pass over rights-of-way granted by the Tribe. The highways are jointly patrolled by the Arizona state, and Navajo tribal, police, but the tribal police force is the primary provider of police protection to the Trading Post and the immediate vicinity. A substation of the Tribe's Tuba City police department is located in Cameron. When a 911 call is placed from the Post, the call is referred to the tribal police for first response. In addition, the Post has an alarm system that triggers calls to the tribal police. That is, when the alarm goes off, the operator of the alarm system calls the tribal police, rather than a non-tribal law enforcement office, to request a response.[25] The Trading Post has a non-loitering policy, and tribal police enforce that policy by requiring juveniles and others that are "hanging out" to move off the Post's property. Tribal police provide assistance to motorists on the highways leading to the Trading Post, including giving directions and changing flat tires.

Fire protection in the area of the Trading Post is provided jointly by the tribal fire department in Tuba City, located about 25 miles from Cameron; the Bureau of Indian Affairs (" BIA") fire department (also located in Tuba City); a fire department called the Timberline department that is located

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[25] As with many private alarm systems, there have been numerous false alarms triggered by the Post's system, including a number of false alarms caused by a cat wandering around the Post's attic. The tribal police department's responses to the private alarms became much less prompt after a number of these false alarms.

45 miles from Cameron; and the Grand Canyon fire department, located over 50 miles from Cameron. The tribal and BIA departments cooperate closely with each other, and provide the primary response to calls from the Cameron area. There has been at least one fire at the Trading Post, to which the tribal fire department as well as the Timberline department responded.

Emergency medical services in the Cameron area are provided by a tribal entity called the Emergency Medical Services Department ("EMS"). EMS maintains two ambulances in Tuba City. EMS responds to all calls from locations within the Navajo Nation, and has responded to numerous calls concerning automobile accidents in the Cameron area. The tribal police and fire departments have also received and responded to many auto accident calls in the area, involving both Navajos and non-Navajos. If the state police called Flagstaff emergency services instead of the tribal EMS, however, the Flagstaff unit would respond to the call.

The Navajo Nation has a tourism department that provides information to prospective visitors over the telephone or through brochures. That department is also attempting to stimulate tourism by developing "vendor villages" in several locations on the reservation that receive heavy tourist use, including the Cameron area.

The Court notes that the Tribe has not questioned Plaintiff's standing to challenge the HOT, either in the tribal proceedings or in this Court. It is not entirely clear that Plaintiff does have such standing, since the tax is not imposed on Plaintiff but on its customers.[26] However, by failing to

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[26] By the express terms of the regulations implementing the HOT, which were approved by the Navajo Tribal Council when the HOT was enacted, the incidence of the tax falls on a hotel's customers, rather than

raise the issue the Tribe deprived Plaintiff of the opportunity to make a factual record that might have established its standing.[27] The issue of standing, therefore, is not addressed in this opinion.

Proper Analysis to be Applied: As noted above, this case involves a tribe's attempt to impose a tax on nonmembers who are staying overnight on fee land located within the reservation boundaries. Plaintiff argues strenuously that, due to the fee-land status of its hotel and the nonmember status of most of its guests, the only jurisdictional factors properly

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the hotel itself. In fact, hotels collecting the tax on behalf of the Tribe, such as Plaintiff, are reimbursed for their administrative costs. Therefore, the incidence of the tax falls on Plaintiff's overnight guests, and it is the relationship between those guests and the Tribe that must be considered in deciding whether the HOT can be upheld. *Cf. Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459-60 (1995) (stating, albeit in the context of a state tax imposed on a tribe, that the "legal incidence" test is an initial and frequently dispositive question in Indian tax cases).

[27] There appears to be no precedent directly on point concerning application of the legal incidence test to a situation involving a tribal tax, rather than a state tax. However, as the Court discusses below, the standard that should be applied to decide the jurisdictional issue in this case is the one set out in *Montana v. United States*, 450 U.S. 544 (1981), and reiterated in *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1409 (1997). *Cf. Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1298-99 (8th Cir. 1994) (reversing summary judgment granted without addressing *Montana* factors raised by the tribe). This standard requires an analysis of whether the nonmembers sought to be taxed have entered consensual relationships with the tribe or its members, or whether those nonmembers' conduct threatens the tribe's political integrity, economic security, or health and welfare. By its very focus on the actions of the nonmembers over whom the tribe seeks jurisdiction, the *Montana* test seems to require application of the legal-incidence test. In this case, in particular, it is important to analyze the extent to which the hotel guests have entered a consensual relationship with the tribe, or have otherwise had enough of an impact on the tribe to allow the tribe to tax them.

considered in this case are those set out in *Montana*, 450 U.S. at 544-45, and reiterated in *Strate*, 117 S.Ct. at 1409. The Court will refer to these factors as the consensual-relationships test. The Tribe, on the other hand, maintains just as strenuously that the consensual-relationships test is not properly applied to this case, for several reasons. The Court will briefly discuss the Tribe's central arguments.

Issue/Claim Preclusion: The Tribe argues that Plaintiff is bound by either claim preclusion (res judicata) or issue preclusion (collateral estoppel) from re-litigating the jurisdictional issue raised in this case. This argument is based on a prior case decided by the Ninth Circuit, in which Plaintiff was held to be subject to the federal Indian Trader statutes and regulations. *Ashcroft v. United States*, 679 F.2d 196 (1982). In so holding, the *Ashcroft* opinion made several statements indicating Plaintiff is subject to tribal jurisdiction. According to the Tribe, these statements are dispositive of the issue raised in this case. However, the parties in the *Ashcroft* case were different, because the Tribe was not involved in *Ashcroft* and the United States was not acting in privity with the Tribe. Accordingly, the claim-preclusion doctrine is not applicable to this case. *See Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1520 (10th Cir. 1990) (res judicata applies where there is an identity of parties). Also, the taxation issue in this case is not the same as the issue presented and necessarily decided in *Ashcroft*. That is, even if Plaintiff is an Indian Trader as far as its transactions with Navajos are concerned, that does not answer the question as to whether the Tribe has jurisdiction to tax Plaintiff's nonmember hotel guests. For this reason, issue preclusion is not appropriate in this case. *See id.* (collateral estoppel applies where the issues raised in the successive proceedings are the same, and determination of those issues was essential to the prior decision). Neither claim preclusion nor issue preclusion, therefore, prevents this Court from reaching the merits of the parties' arguments.

Merrion Test vs. Montana Test: The Tribe also argues that the *Montana* test does not apply to taxation cases. Instead, argues the Tribe, tax jurisdiction, unlike regulatory or adjudicative jurisdiction, is strictly territorial in nature. According to the Tribe, as long as the activity takes place within the Tribe's territorial jurisdiction, and the Tribe provides some services to the taxpayer, the Tribe may tax the activity. This argument is based on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which discussed the tribe's provision of services and the "advantages of a civilized society" as a basis for tribal taxation of nonmember activity taking place on a reservation. Plaintiff responds to this argument by pointing out that *Merrion* involved activity occurring on tribal land, not fee land, and by arguing that the *Merrion* provision-of-services discussion has no applicability to fee-land cases. Instead, Plaintiff insists, the *Montana* consensual-relationships test is the only analysis properly applied to determine the limits of all tribal civil jurisdiction over fee land located inside a reservation, including the power to tax.

The Tribe's argument that *Merrion* is the proper test to apply is based on a Tenth Circuit case which, according to the Tribe, supports its claim that taxation jurisdiction is different than other civil jurisdiction, and is more strictly territorial. In *Pittsburg Midway Coal Mining Co. v Watchman*, 52 F.3d 1531, 1540-41 (10th Cir. 1995), a tribal-tax case, the Tenth Circuit held that the plaintiff would be required to exhaust its tribal remedies if its coal mine were determined to be located in Indian Country. In so holding, the Tenth Circuit made some statements about tribal jurisdiction to tax, connecting that jurisdiction with the definition of Indian Country found in 18 U.S.C. § 1151—reservations, allotments, and dependent Indian communities. The Court also concluded that "the Navajo Nation has authority to tax any mining activities

taking place in Indian country without violating any express jurisdictional prohibitions." 52 F.3d at 1541.

Read broadly, the above language could be interpreted to mean the Tenth Circuit has established different guidelines for taxing jurisdiction than for regulatory or tribal court civil jurisdiction. The *Montana* test would apply to regulatory matters and, pursuant to *Strate*, to cases involving civil litigation in tribal court. The 18 U.S.C. § 1151 definition of Indian Country, in conjunction, with the *Merrion* provision-of-services test, would apply to tax jurisdiction questions. The Court does not believe the Tenth Circuit intended such a broad reading of its holding. Instead, the language of *Pittsburg & Midway* must be read in light of the question that was answered in that case. The only issue before the Tenth Circuit was whether the tribe's attempt to impose a tax on the plaintiff's mine was "patently violative of express jurisdictional prohibitions," so as to excuse the plaintiff from exhausting its tribal remedies. 52 F.3d at 1539-40. For purposes of that question only, the *Pittsburgh & Midway* opinion holds that no express jurisdictional prohibition will be violated if the activity sought to be taxed takes place within Indian Country, as defined by 18 U.S.C. § 1151. That is, § 1151 creates, subject to other considerations such as the *Montana* and *Merrion* factors, a rebuttable presumption of jurisdiction to tax non-Indian activity taking place within a reservation, allotment, or dependent Indian community. *Cf. Texaco. Inc. v. Hale*, 81 F.3d 934, 938 (10th Cir. 1996) (In addition to the fact the tribally taxed activities occurred within Indian Country, both the district and appellate courts considered contractual and consensual relationships in deciding exhaustion of tribal remedies should be required). This does not mean, however, that all such activities taking place in locations that fall within Indian Country are automatically taxable by the tribe. It means only that nonmembers engaging in activity that is arguably located in

Indian Country, who wish to challenge a tribal tax, will be required to exhaust their tribal remedies before proceeding to federal court. The Court therefore does not accept the Tribe's argument that the *Pittsburg & Midway* opinion precludes application of the *Montana* test to the HOT involved in this case.

Consensual-relationships Test as Applied to this Case: It is clear to the Court that the consensual-relationships test of *Montana* and *Strate* is the proper framework within which to analyze this taxation case. In both *Montana* and *Strate*, the Supreme Court mentioned the tribes' right to tax certain activities as a matter of inherent sovereign power. However, both opinions limit this power by imposing conditions on it, specifically stating that a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, or that seriously affect the political integrity, economic security, or health and welfare of the tribe. *Montana*, 450 U.S. at 565-66; *Strate*, quoting *Montana*, 117 S.Ct. at 1409. The Supreme Court's inclusion of the taxation power within its discussion of the consensual-relationships test indicates that the test applies to that form of tribal jurisdiction as well as to tribal regulatory and judicial authority over non-members.

On the other hand, *Merrion* cannot simply be ignored, as Plaintiff would have it, because the activity in this case takes place on fee land. Where a tribe provides essential services within Indian Country, even to nonmembers and even on fee land, and thus affords the "benefits of a civilized society" to those nonmembers, fairness indicates that it be allowed to impose taxes to help pay for those services. This is merely the flip side of *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), which upheld the application of state taxes to oil and gas extracted from a reservation by non-Indian companies. In doing so, the *Cotton* opinion emphasized the

fact that the state provided services to the companies and the tribe, and distinguished prior cases in which the state had in effect washed its hands of the activity and had nothing to do with the activity, save tax it. 490 U.S. at 186. Of course, the tribe's interest in taxing an activity is strongest where the revenues derived from the activity are derived from value generated on a reservation, by tribal activity, and where the taxpayer receives tribal services. *Merrion*, 455 U.S. at 138. This does not mean, however, that the tribe has no such interest where the value is not generated by tribal activity and occurs on fee land, if services are provided anyway and the fee land is located in Indian Country. The *Merrion* provision-of-services or benefits-of-a-civilized-society factors, thus, are relevant to the *Montana* test because they are indicators that the necessary consensual relationship is present to allow the tribe to impose a tax upon the fee-land activity.

The real question with respect to tribal-taxation cases and the consensual relationships test is whether the nonmembers' consensual activity within Indian Country is significant enough to allow the tribe to tax that activity. *Cf., e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 430-31 (1989) (tribe's interest in zoning fee lands within reservation becomes stronger as the impact on the tribe from activity on the fee lands becomes more serious). The Court's review of case law concerning tribal jurisdiction over nonmembers indicates that the extent to which a tribe will be allowed to regulate or affect non-Indian activity is often determined on a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction. *Id.*; *cf. Cotton Petroleum*, 490 U.S. at 186, n. 17 (discussing fact that certain state taxes were extraordinarily high and had a negative effect on the marketability of the tribe's coal as basis for disallowing taxes); *see generally Washington v. Confederated Tribes of*

the Colville Reservation, 447 U.S. 134, 156 (1980) (principle of tribal self-government is grounded in notions of inherent sovereignty and congressional policies, and seeks an accommodation between the interests of the tribes, the federal government, and the state); Cohen, *Handbook of Federal Indian Law* 256-57 (describing *Montana* and *Colville* as applying a test based on the significance of tribal interests involved, to determine whether tribe would be allowed to exercise regulatory control or taxing authority over nonmembers).

To properly perform the necessary balancing test required for determining whether the HOT was validly imposed on Plaintiff's hotel guests in this case, it is necessary to examine the nature of the relationship between those guests and the Tribe, and the extent to which the Tribe provides services to those guests while they are on the reservation, compared to the burden placed on those guests by the HOT. No explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members. However, where Plaintiff's customers travel onto the reservation, stay overnight, and take advantage of the establishment of a civilized society there, that is consensual activity. *Cf.* NMSA 1978, § 66-8-107 (by driving in New Mexico, motorists give implied consent to have their breath tested for alcohol if they are stopped for driving under the influence). The Court finds that one necessary predicate for taxation, a consensual relationship, was present in this case.[28]

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[28] The Court does not mean to imply that a consensual relationship is always a necessary prerequisite for taxation. Consideration of the other half of the *Montana* test, the significant impacts factor, in an appropriate case may be sufficient to allow the tribe to impose its tax. It is not necessary to consider that possibility in this case.

The next step requires an analysis of the nature of the hotel guests' activity on the reservation and the extent to which the Tribe provides services that are relevant to that activity. The guests' activity, of course, consists of their trip to the reservation and their overnight stay. By engaging in that activity, the guests voluntarily put themselves in the position of possibly needing assistance from tribal personnel. Motor vehicle accidents involving tourists have occurred in the past and will almost certainly occur again. Tribal EMS personnel, police officers, and fire department personnel all respond to calls involving such accidents. In addition, tribal police officers provide directions to tourists, change flat tires, and provide other miscellaneous assistance. Furthermore, tribal police officers are the primary providers of law enforcement in the Cameron area, and regularly patrol the Trading Post, removing loiterers and intoxicated individuals. The mere presence of tribal police officers on the highways, enforcing traffic regulations and other laws, contributes to the safety of tourists by deterring unsafe or illegal behavior. Finally, the tribal tourism department provides information services to prospective or current visitors to the area, and is working on projects designed to enhance the experience of tourists visiting the reservation. In sum, the Tribe provides Plaintiff's overnight guests with the "benefits of civilized society" while the guests are present, and the presence of the guests creates a greater need, both actual and potential, for tribal services. The fact that some of these services are also provided, to a lesser extent, by the state of Arizona, does not lessen the Tribe's interest in the hotel guests' on-reservation activity.[29]

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[29] The main difficulty with the application of the "benefits of a civilized society" test is that while government services in Indian Country are often sparse, both the tribe and state (including local and country entities) are allowed to impose taxes to pay for such services. This "dual

As to the burdens imposed by the Tribe on the nonmember guests, they are minimal. Unlike zoning restrictions or hunting and fishing regulations, which directly restrict nonmembers' ability to act or use their property in certain ways, the HOT involves only the payment of a tax of 8% of the room rate. There was evidence that this rate is lower than the occupancy-tax rate imposed by many municipalities, and Plaintiff made no attempt to argue that there was a great disparity between the amount of the tax paid and the services provided by the Tribe.

As the foregoing analysis shows, application of the balancing test required in cases such as this establishes that the Tribe has the authority to impose the HOT on Plaintiff's hotel guests. The services as well as the civilized society provided by the Tribe are directly related to activity engaged in on the reservation, and the burden created by the HOT is small. Under *Cotton Petroleum* and *Merrion*, a state has joint taxing authority with a tribe over non-Indian activity taking place on tribal lands, as long as the state provides some level of services. Similarly, where a tribe provides essential services to non-members who voluntarily visit the reservation, even if the visit is primarily to fee land, the tribe should at minimum have joint taxing authority over the activities to which the tribe's services are relevant. This is not a case in which the Tribe has nothing to do with the fee-land activity, save tax it. *See Cotton Petroleum*. Accordingly,

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taxation" puts business enterprises within Indian Country at a competitive disadvantage. See Robert W. Alexander, *The Collision of Tribal Natural Resource Development and State Taxation An Economic Analysis*, 27 N.M.L.Rev. 387 (1997). Unfortunately, however, the most obvious and equitable solution to this dilemma, a revenue sharing agreement, is beyond this Court's power.

the Court holds that the Tribe has jurisdiction to impose the HOT on Plaintiff's guests.[30]

Conclusion

Based on the foregoing, the Tribe's motion for summary judgment will be granted, and Plaintiffs motions for summary judgment and for a trial *de novo* will be denied.

An Order in accordance with this Memorandum Opinion will issue.

Dated August 14, 1998.

/s/ BRUCE D. BLACK
United States District Judge

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[30] The Court notes that Plaintiff several times mentioned the fact that neither Plaintiff nor its overnight guests are entitled to vote in Navajo elections, and pointed out that the HOT was plainly designed to apply mainly to non-members, who are the ones most likely to be staying at hotels. Plaintiff did not develop the argument into a taxation-without-representation theme or provide legal authority. In any event, these facts have no impact on the validity of the HOT. All occupancy taxes are designed to shift some of the burden of financing government services from residents to nonresidents, and all such taxes apply mainly to nonresidents of the locality, who cannot vote in the elections that ultimately result in the enactment of occupancy taxes. *See Miami Dolphins Ltd. v. Metropolitan Dade County*, 394 So. 2d 981 (Fla. App. 1981) (room tax not discriminatory as to nonresidents); *see also People v. Evans*, 57 Cal. Rptr. 276 (Cal. App. 1967) (tax on transients based on privilege of temporary occupancy and did not violate constitution). The Court has found no case invalidating a hotel occupancy tax on the basis that the parties paying the tax were not entitled to vote in the locality imposing the tax.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV. No. 97-1261 BB/LFG

ATKINSON TRADING CO., INC. A NEW MEXICO CORPORATION,
Plaintiff,

VS.

NELSON GORMAN, HOMER BLUEHOUSE, KING MIKE, JR., LEANDER BERGEN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Defendants.

ORDER

A Memorandum Opinion in the above-entitled case was entered this date.

IT IS THEREFORE ORDERED that Defendants' March 30, 1998 motion for summary judgment (Doc. 23) be, and hereby is, GRANTED, and Plaintiff's March 30, 1998 motions for summary judgment and for trial *de novo* (Docs. 19, 21) be, and hereby are, DENIED. This case is therefore dismissed.

DATED August 21, 1998.

/s/ BRUCE D. BLACK
United States District Judge

APPENDIX D

SUPREME COURT OF THE NAVAJO NATION

No. SC-CV-54-95

In the Matter of: ATKINSON Trading Company, Inc.,
Appellant.

OPINION

Before YAZZIE, Chief Justice, AUSTIN and CADMAN, Associate Justices.

Appeal from a decision of the Navajo Tax Commission, No. 95-008.

James B. Collins, Esq., Farmington, New Mexico, William J. Darling, Esq., Albuquerque, New Mexico, and Katherine M. Peck, Esq., Albuquerque, New Mexico, for the Appellant; Marcelino R. Gomez, Esq., and Luralene Tapahe, Esq., Navajo Nation Department of Justice, Window Rock, Navajo Nation (Arizona), for the Appellee Navajo Tax Commission. Opinion delivered by AUSTIN, Associate Justice.

In 1994, Atkinson Trading Company, Inc. (Atkinson) sought a federal district court declaratory judgment claiming that the Navajo Nation cannot impose a hotel occupancy tax on its non-Indian guests and require it to collect and remit that tax to the Navajo Nation. *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506 (D.N.M. 1994). The court declined to consider that issue and properly sent the question to the Navajo Nation forum to "evaluate tribal law in light of existing federal law," trusting that "[t]here is every reason to expect that the Navajo Nation will grant plaintiff a fair, unbiased consideration of its arguments about why the Hotel Occupancy Tax should not be imposed on plaintiff's operations." *Id.* at 512.

The Navajo Tax Commission (Commission) considered Atkinson's claims and, after applying the tests in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), and *Montana v. United States*, 450 U.S. 544, 565-66 (1981), ruled that Atkinson was subject to provisions of the Navajo Nation Hotel Occupancy Tax, to help defray the costs of Navajo Nation governmental services which benefit Atkinson and its guests. Atkinson appeals. The sole issue we address is whether Atkinson is subject to provisions of the Navajo Nation Hotel Occupancy Tax for the rental of rooms at a facility located on non-Indian fee land within the exterior boundaries of the Navajo Nation. In other words, does existing federal law preclude the Navajo Nation from applying its hotel tax to non-Navajo tourists lodging on non-Indian fee land and requiring Atkinson to collect and remit that tax?

I.

On July 30, 1992, the Navajo Nation Council enacted the Navajo Nation Hotel Occupancy Tax, 24 N.N.C. §§ 101-142 (1995), which became effective on January 1, 1993. It is imposed on all guests who rent hotel rooms within the exterior boundaries of the Navajo Nation. The hotel proprietor must collect, remit and report the tax to the Navajo Nation. 24 N.N.C. §§ 102, 104. The proprietor can keep "one percent of the amount of the tax due as shown on the return" as reimbursement for its tax collection costs. 24 N.N.C. § 109. The tax is used to promote tourism and develop tourism-related projects in the Navajo Nation. 24 N.N.C. § 142. The Commission administers the tax. 24 N.N.C. § 108.

Atkinson, a New Mexico Corporation with a principal place of business at Gallup, New Mexico, operates a facility known as the Cameron Trading Post at Cameron, Navajo Nation (Arizona), within the exterior boundaries of the Navajo Nation. The facility is located on non-Indian fee land

and completely surrounded by Navajo Nation trust lands. See Act to Define the Exterior Boundaries of the Navajo Indian Reservation in Arizona and for Other Purposes, 48 Stat. 960-62 (June 14, 1934) (1934 Boundary Act). The facility caters to the tourist trade, with a hotel, restaurant, cafeteria, gallery, curio shop, retail store and recreational vehicle park. It is near the east entrance to the Grand Canyon.[31] The guests who stay at the hotel and use the facilities are primarily non-Navajo tourists. They are required to pay a tax for their room, which Atkinson must collect and remit to the Navajo Nation.[32]

The Commission found that guests are served by Navajo employees of the facility, who are 75 to 80% of Atkinson's work force. Guests get goods brought by suppliers who enter and travel across the Navajo Nation to reach Atkinson's facility. That includes Navajo arts and crafts which Atkinson buys from off-reservation sources. Atkinson stopped buying arts and crafts from Navajo artisans in 1995, apparently to avoid direct contact with Navajos and to avoid Navajo Nation regulation. A small amount of sales are made to Navajo Nation members.

The Navajo Nation Police, the primary law enforcement agency in the Cameron area, and the Navajo Nation Fire

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[31] We take judicial notice that the Cameron Trading Post sits near the junction of U.S. Highway 89 and Arizona Route 64, which goes to the Little Colorado River (Navajo Nation) Tribal Park and enters Grand Canyon National Park. See, Map 44, Parks and Sacred Places, James M. Goodman, *The Navajo Atlas* 88 (1982). The record does not disclose the history of Cameron Trading Post in the area. We also take judicial notice that it is significant that the business, operating under the names "trading company" and "trading post" and headquartered in Gallup, New Mexico, is based on a longstanding history of using Indian trading posts and Navajo Indians as a lure for tourists.

[32] The record does not show a tourist challenge to the tax.

Department, protect the tourists and Atkinson's facility. Both respond to emergency calls, including 911 calls, from tourists and local residents. The police routinely patrol and perform security checks in the area, including Atkinson's facility, which benefit tourist safety and security. The police respond to accidents involving non-Indian tourists and call Navajo Nation emergency medical services for them when needed. The Navajo Nation Division of Health protects the health of guests by inspecting food preparation conditions, not only in the Cameron area, but throughout the Navajo Nation. The Navajo Nation Tourism Department serves guests by telling them of the attractions of the Navajo Nation and provides facilities, and that function also serves Atkinson. As a general matter, the Navajo Nation government funds many kinds of activities which benefit Atkinson and its guests, including economic development ventures, human resource programs, natural resource development (including parks and scenic sites), public safety, health services, social services, education, and legislative and judicial services.

In sum, Atkinson and Cameron, as an (Indian) trading "company" or "post," operate in a Navajo environment and use Navajo trappings to lure tourists. Those tourists and the facility benefit from a wide range of Navajo Nation governmental services.

II.

At the outset, Atkinson concedes that anyone lodging on trust lands and Navajo Nation members lodging on non-Indian fee lands can be charged a Navajo Nation hotel tax. Appellant's Brief at 6. But as to non-members renting rooms on non-Indian fee lands, Atkinson claims that the Navajo Nation has no power to impose its hotel tax or require non-member businesses to collect and remit that tax. Apparently, Atkinson is willing to collect and remit the tax if it is imposed on Navajo Nation members only at its facility.

Atkinson has resisted regulation as an entity doing business in Indian Country before. In *Ashcroft v. United States*, 679 F.2d 196 (9th Cir. 1982), Atkinson (then an Arizona corporation and doing business as Gilbert Ortega's Cameron Trading Post) opposed federal regulation as an Indian trader under the Indian Trader Statutes, 25 U.S.C. §§ 261-264. There, as here,[33] Atkinson claimed that its lands "either existed before the creation of the [Navajo] Reservation or were withdrawn from the reservation after its creation." *Ashcroft*, 679 F.2d at 198, n.1. Therefore, Atkinson claimed the United States had no authority to regulate its trade on fee land within the exterior boundaries of an Indian reservation because it was "not on the reservation."[34] *Id.* at 198 (emphasis added). The court disagreed, finding that federal business regulations defining on-reservation activities, and the doctrine of inherent tribal sovereign power proclaimed in several United States Supreme Court decisions,[35] compelled a ruling that business activities conducted on fee land within the exterior boundaries of a reservation were in fact "on" reservation

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[33] Atkinson says its fee land resembles a donut: "Clearly, the hole in the center of a donut is not a part of the donut and here Congress carved out a hole in tribal jurisdiction when it extended the boundaries of the Navajo Reservation to surround Cameron Trading Post." Appellant's Brief at 14.

[34] The Commission rejected the contention that rulings in the *Ashcroft* decision bound its decision under preclusion doctrines of res adjudicata or collateral estoppel because the issues in the federal case were different. On appeal, the Commission invites us to apply those preclusion doctrines. Without deciding that question, we prefer to address the merits raised by Atkinson.

[35] *Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla v. Apache Tribe*, 455 U.S. 130 (1982); *Kennerly v. District Court*, 400 U.S. 423 (1971); and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

conduct which could be regulated by either the United States or an Indian nation. *Id.* at 199-200. The court explained that "Indian tribes retain inherent sovereign power to act in accordance with the authority recognized in this regulation with respect to all land within the exterior boundaries of the reservation whether it be fee patent, tribal or trust property." *Id.* at 199, n.2.

The General Allotment Act of 1887, 24 Stat. 388 (February 8, 1887), was one of the most oppressive and destructive pieces of Indian legislation ever enacted by Congress. It stripped Indian nations of at least two-thirds of their land base and forced many Indian people into homelessness and destitution. Congress recognized its mistake and passed the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984-88 (June 18, 1934), which, among other things, ended the allotment policy. Section 5 of the IRA authorizes the Secretary of the Interior to acquire lands and land rights "for the purpose of providing land for Indians," and Section 7 authorizes the Secretary to "add . . . lands to existing reservations."[36] The Navajo People reserved to themselves a minute portion of their aboriginal homelands in the 1868 Navajo Treaty, 15 Stat. 667 (June 1, 1868). The 1868 Treaty is significant here for two reasons: it defines the original Navajo Reservation (an "existing reservation" referred to in section 7 of the IRA), and it proclaims the Navajo Nation's retained inherent sovereign authority over the exterior boundaries of its territory—then and now.

In 1934, Congress, anticipating that the IRA would restore land to existing Indian reservations and correct the abuses of the General Allotment Act, passed the 1934

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[36] To restate the obvious, the term "reservation" means lands "reserved" by Indian nations or their homelands. It does not mean (at least in the Navajo Nation context) a generous gift from the United States.

Boundary Act "[t]o define the exterior boundaries of the Navajo Indian Reservation in Arizona. . . ." 48 Stat. 960. The 1934 Boundary Act brought the Cameron area back into the territorial jurisdiction of the Navajo Nation, and included the subject fee land within the exterior boundaries of the Navajo Nation. Therefore, Atkinson's facility is located within Navajo Indian Country, which is defined as follows:

> The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian Communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.

7 N.N.C. § 254 (1995).

This definition of Navajo Indian Country is derived from the federal statutory definition of "Indian Country," 18 U.S.C. § 1151.[37] Navajo Nation Council Resolution No. CMY-28-70 (May 7, 1970). In *Ashcroft*, the court applied federal regulatory definitions of what it means to be "on" an Indian reservation or within Indian Country, and concluded that Atkinson was indeed doing business "on" the Navajo Reservation or within Navajo Indian Country. 679 F.2d at 198-200.

Indian Country includes "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any

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[37] The United States Supreme Court has held that this federal criminal jurisdiction statute "generally applies as well to questions of civil jurisdiction." *De Coteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). The Indian Country statute is the measure of tribal civil authority. See *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Pittsburgh & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531 (10th Cir. 1995). The Tenth Circuit Court of Appeals held in *Watchman:* The Indian Country statute "represents an express Congressional delegation of civil authority over Indian country to the tribes." 52 F.3d at 1541. Consequently, the court found that "the Navajo Nation has the authority to tax any mining activities taking place in Indian country without violating any express [federal] jurisdictional prohibitions." 52 F.3d at 1541. Accordingly, Atkinson's fee land is in the Navajo Nation, and its business activities, including the renting of hotel rooms to non-Indian tourists, takes place within Navajo Indian Country.

III.

Despite Atkinson's physical presence within the Navajo Nation, as well as the entry of non-Navajo tourists,[38] does the Navajo Nation have the lawful power to tax guests or require Atkinson to collect that tax? The Navajo Nation enjoys governmental authority over its territory, as does any sovereign. The federal courts have agreed, particularly with respect to Indian nation taxing power. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 142 ("there is a significant territorial component to tribal power . . . [including] . . . Indian taxing power..."); *Buster v. Wright,* 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906) (a tribe may prescribe the terms upon which non-Indians conduct business within its borders). Thus, the general

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[38] Non-Indians are not permitted to "pass over, settle upon, or reside in" the Navajo Nation without proper authorization pursuant to Article II of the 1868 Navajo Treaty.

principle is Indian nations have the inherent power to tax using their general governmental authority, except to the extent Congress has expressly limited that power, and that governmental authority includes taxation of non-Indians who are present within Indian Country. Felix S. Cohen, *Handbook of Federal Indian Law* 431-35 (1982 ed.); *Washington v. Confederated Tribes*, 447 U.S. 134, 152-54 (1980).

In 1893, a federal appeals court considered the issue of whether the Creek Nation could use the federal courts to collect a tax it imposed on a non-Indian resident of its territory. *Crabtree v. Madden*, 54 F. 426, 428 (8th Cir. 1893). While the question of the Indian nation's authority to tax non-Indians was not before it, the court noted a "presumption" that the Creek Nation lawfully imposed its tax and had the lawful authority to collect the tax using its own remedies. *Id.* at 429. The same court ruled in a subsequent case that Indian nations have inherent authority to tax non-Indians present and doing business within its territory. *Buster v. Wright*, 135 F. 947, 950, 958.[39] There, the Creek Nation imposed a permit tax on non-Indians doing business on non-Indian fee land within the Nation's territory. *Id.* at 949-950. The court affirmed the Creek Nation's power to tax:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original

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[39] It is important to the issue before us that the United States Supreme Court cited *Buster v. Wright*, *id.*, as authority in *Washington v. Confederated Tribes*, 447 U. S. 134, 153 (a case dealing with tribes' power to tax non-Indians), and *Montana v. United States*, 450 U.S. 544, 566 (a case deciding the issue of a tribe's power over non-Indian conduct on non-Indian fee land within the borders of a reservation).

> sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

Id. at 950.

On the question of the Creek Nation's jurisdiction over the non-Indian lots, the court said, "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes. . . ." *Id.* at 951. That is because:

> Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.

Id. at 952. Despite non-Indian arguments that their businesses could not be taxed because the lots and town sites had been withdrawn from Creek Nation jurisdiction, the court applied the rule that "the governmental power of a nation is not limited to the occupants of the lands in its country which the nation itself owns, but extends to all the inhabitants of its territory." *Id.* At 952. Unlike the Navajo Nation, the Creek Nation acquired its lands by "a patent from the United States," but the court deemed irrelevant the method of acquisition, because the Nation had full jurisdiction over those lands as guaranteed by its treaties with the United States. *Id.* at 952-53.

The United States Supreme Court decided the issue of the Indian nations' power to tax non-Indians in *Washington v. Confederated Tribes,* 447 U.S. 134. There, the State of

Washington contended that the Colville, Makah, and Lummi Nations had "no power to impose their cigarette taxes on nontribal purchasers." *Id.* at 152. The Court disagreed:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.[40]

Id. (citation omitted). Although fee lands were not implicated, it is significant that the Court used an historical approach to conclude that "federal law to date has not worked a divestiture of Indian taxing power." *Id.* at 152. The Court bolstered its decision by citing with approval 1881, 1855 and 1900 Attorney General opinions and consistent Executive Branch recognition of Indian nations' power to tax. *Id.* at 152-53. The Court also concluded that the power to tax, including the taxation of non-Indians, was a power under "existing law" confirmed by section 16 of the IRA. *Id.* at 153. Moreover, the Court approved a 1934 Interior Department Solicitor's opinion, *Powers of Indian Tribes*, 55 ID 14, 46 (1934), which concluded as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers, so* far as such nonmembers may

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[40] The "trust lands" qualifier is irrelevant to our case, because the court in *Ashcroft*, 679 F.2d at 200, relied on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (Montana could not tax fee land within reservation because "checkerboard jurisdiction" would result, which is contrary to statutory Indian jurisdiction law), to reject Atkinson's claims linking Navajo Nation authority solely to "Indian" lands.

accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

477 U.S. at 153 (emphasis in original).

One remaining question was the source of Indian nation taxing power: Did it hinge upon the power to exclude nonmembers from the tribe's territory or was it an inherent sovereign power? That issue was resolved in *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 136-37, where the tribe imposed an oil and natural gas severance tax upon non-Indian owned oil firms that had obtained long term drilling leases for tribal land. The Supreme Court said, "[w]e disagree with the premise that, the power to tax derives only from the power to exclude." *Id.* at 137. The Court elaborated:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

Id. (citation omitted).

Several significant general principles on Navajo Nation taxing power can be gleaned from these Indian nation taxation cases: 1) the Navajo Nation's power to tax is an essential and inherent attribute of its original sovereignty and that power remains intact until divested by federal law; 2) the Navajo Nation's taxing power extends over its territorial jurisdiction (Navajo Indian Country), which includes trust land, allotments and fee lands; and 3) the Navajo Nation's

power to tax extends to all persons who enter its territorial jurisdiction, including over non-members who engage in activities, economic or otherwise, within that jurisdiction. We now turn to Atkinson's argument that the Navajo Nation does not have the power to "tax transactions between nonmembers on fee lands and to require nonmember businesses to collect and remit such taxes." Appellant's Brief at 6.

A.

The United States Supreme Court recently ruled that 16 *Montana v. United States*, 450 U.S. 544, provides the controlling rule of law for deciding issues similar to the one before us. *Strate, et al. v. A-1 Contractors et al.*, 520 U.S. ___, 137 L.Ed. 2d 661 (1997). The Court summarized *Montana's* general rule as follows:

> [A]bsent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Id. at 671.

Relying on *Montana*, Atkinson argues that language in section one of the 1934 Boundary Act "expressly limited Navajo control" over its fee land. That language states as follows: "All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the area [the Arizona portion of the Navajo Indian Reservation] so defined shall not be affected by this Act." We disagree with Atkinson. Congress must clearly and unequivocally state in a federal statute that it has divested an Indian tribe of its retained inherent sovereign power. See

Bryan v. Itasca County, 426 U.S. 373, 392 (1976); *State of Rhode island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994). Nowhere in the 1934 Boundary Act has Congress unequivocally expressed its intent to divest the Navajo Nation of its inherent taxing power. The United States Supreme Court's conclusion in *Washington v. Confederated Tribes* still rings true today: "The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power." 447 U.S. at 152. Also, a proper respect both for Navajo Nation sovereignty and Congress' special power in this area rejects any implication that the 1934 Boundary Act implicitly divested the Navajo Nation of its inherent taxing power. *Merrion*, 455 U.S. at 149-152.

The language in the 1934 Boundary Act that Atkinson relies on does nothing more than reserve the proprietary rights of the fee holders upon expansion of the Navajo Indian Reservation. The language does not contain any special restriction on Navajo Nation governmental power, except to protect the preexisting rights of fee patent holders. *Ashcroft* put it aptly: "This would appear to mean simply that the tracts [non-Indian fee lands within the Navajo Nation] are neither tribal nor trust property. There is no indication in the record that the tracts in question differ in any way from other non-Indian fee land within a reservation." 679 F.2d at 198, n.l. Atkinson's fee land is undistinguishable from other non-Indian fee land within Indian reservation boundaries which other cases have found to be under tribal civil jurisdiction. See, *e.g., United States v. Mazurie*, 419 U.S. 544 (1975).

B.

Montana's rule that the Court summarized in *Strate* is this:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-

> Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. (citations omitted). A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66 (citations omitted).

Montana's rule instructs that Indian nations "retain inherent sovereign power" over non-Indian conduct on non-Indian fee land within the borders of an Indian nation if the non-Indian "enter[s] consensual relationships with the tribe or its members." 450 U.S. at 565. The Court in *Strate* listed several cases which it said qualified under the consensual relationships exception. 137 L.Ed 2d at 677-78. Two of those cases bear directly on the case before us. The first case, *Buster v. Wright*, 135 F. 947, has facts remarkably similar to ours.[41] There the Choctaw Nation imposed a permit tax on

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[41] Atkinson argues that *Buster v. Wright*, *id.*, does not support the Commission's decision because, unlike the Navajo Nation, the Creek Nation had not yet lost its inherent right to exclude nonmembers from its reservation. Therefore, the Creek Nation could condition entry and conduct of business on the reservation on the non-member's agreement to pay a required license fee. Appellant's Supplemental Brief at 8. Atkinson's argument is faulty. The Creek Nation, a tribe that did not own aboriginal lands in the Indian territory in the first place, was without power to exclude anyone who was in lawful possession of any parcel of land within any town site on its reservation. *135 F.* at 950, 952. This lack of power was immaterial because the Creek Nation's authority to tax business transactions within its borders derived from its inherent and original sovereignty. *Id.*

non-Indians conducting business on non-Indian fee lands within the Nation's jurisdiction. The court ruled that the Creek Nation had the inherent sovereign power to tax and prescribe the terms upon which non-Indians may conduct business within its borders. Apparently, the non-Indians met the consensual relationships exception when they accepted the privilege of doing business within the Creek Nation's borders. In the second case, *Washington v. Confederated Tribes*, 447 U.S. 134, non-Indians entered consensual relationships with the tribes or their members when they entered the Nations' jurisdiction to purchase tobacco products from tribal vendors. The Court found the tribal interest in raising revenues for essential governmental services "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and *when the taxpayer is the recipient of tribal services*." 447 U.S. at 156-157 (emphasis ours). The Court elaborated on what it means to be the recipient of tribal services and the concomitant need of tribes to raise revenue to fund those services in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-138. The Court found Indian nation taxing power essential "to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Id.*

Read closely, these three cases reveal a nexus between the non-Indian activity to be taxed and the Indian nation imposing the tax. Thus, to decide whether our case qualifies under *Montana's* consensual relationships exception, we ask whether Atkinson and its guests, both of whom transact business within Navajo Nation jurisdiction, receive *benefits* from the Navajo Nation government "for which it may be taxed." *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899, 904 (9th Cir. 1991). Stated another way, did Atkinson avail itself "of the substantial privilege of carrying

on business" within the Navajo Nation, or did Atkinson and its guests "benefit from the provision of police protection and other governmental services, as well as from the advantages of a civilized society" that are assured by the Navajo Nation government? *Merrion*, 455 U.S. at 137-138 (internal quotation marks omitted). The facts in the record demand an affirmative answer.

Just like the non-Indians in *Buster v. Wright*, 135 F. 947, our case's facts show that Atkinson has availed itself of the substantial privilege of carrying on business within Navajo Nation jurisdiction. Atkinson's facility is located and operates within Navajo Nation jurisdiction or Navajo Indian Country. These facts are bolstered by the federal court's ruling that Atkinson is subject to federal laws regulating trade with Indians on Indian lands, because it operates on the Navajo Nation as an Indian trader. *Ashcroft*, 679 F.2d 196. Atkinson uses a Navajo Indian environment, including culture, Navajo employees, crafts, and other Navajo Indian trappings, to lure tourists to its facility for business purposes. While on Atkinson's property, the tourists are served by Navajo employees, who make up a majority of Atkinson's work force, to provide a distinctly Navajo flavor. Suppliers enter and drive across the Navajo Nation to bring Atkinson and its guests goods, because Atkinson has accepted the privilege of doing business on the Navajo Nation.

Moreover, a non-Indian was held to have met the consensual relationships exception simply by engaging in commercial activity with tribal members. *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982). Here, Atkinson has purchased arts and crafts from Navajo tribal members and sales have been made to tribal members. Furthermore, Atkinson has even suggested that it might be subject to Navajo Nation labor laws because it employs a large number of Navajo tribal members. Appellant's Brief at 19.

Atkinson and its guests receive and benefit from many modern Navajo Nation governmental services, or from the advantages of a civilized society that are assured by the Navajo Nation Government. The Navajo Nation police respond to calls from Atkinson's guests and the Cameron Trading Post and perform routine security checks on Atkinson's facility. The Navajo Nation Fire Department responds to alarms and calls from Atkinson's guests and the Cameron Trading Post. The Navajo Nation Emergency Medical Services provides medical services to Atkinson's guests when needed. The Navajo Nation Government provides other services to Atkinson and its guests including health protection through the Navajo Nation Division of Health, tourism services through the Navajo Nation Tourism Department, and as a general matter economic ventures, human resource programs, natural resource development, public safety, health services, social services, education, and legislative and judicial services.

Accordingly, we hold that the facts of this case qualify it under *Montana's* consensual relationships exception. "Under these circumstances, there is nothing exceptional in requiring [Atkinson and its guests] to contribute through taxes to the general cost of [Navajo Nation] government." *Merrion*, 455 U.S. at 138-39 (citations omitted).

The other minor issue we address is the contention that somehow tourists and Atkinson are "just passing through" and the Navajo Nation has no material interest in that activity which would justify taxation. That argument was raised in *Burlington Northern R.R.*, 924 F.2d at 902, where the Blackfeet Nation imposed a possessory interest tax upon a railroad which had a statutory right-of-way through the Nation. The court dismissed the claim finding that the Nation had a significant interest because "Burlington is the recipient of tribal services." *Id.* at 904. Nothing further need be said on this minor issue.

C.

The *Strate* decision reiterated the second *Montana* test for civil jurisdiction, namely there is tribal civil jurisdiction aside from consent where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 520 U.S. at ___, 137 L.Ed. 2d at 678 (internal quotations and citations omitted). The conduct need only "threaten" those Indian nation interests. What then are the Navajo Nation's political integrity, economic security, and health and welfare interests with regard to an Indian trading post and associated hotel operating within Navajo Indian Country?

Taxation, that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity. A sovereign nation that cannot raise revenues to conduct governmental operations cannot function. Aside from the need to raise revenue to fund essential governmental services, *Merrion*, 455 U.S. at 137, taxation is a method of business regulation. A hotel occupancy tax is utilized to determine and project the number of tourist visits each year. Funds are then channeled to those governmental programs which benefit tourists, including police and fire protection, medical treatment, health inspections, tourism information, tourist facilities, and others.

The economic security element is similar. The Navajo Nation is seeking self-reliance and economic security through taxation. The present national trend is to shift the financial obligations of governance and government services from the federal government to the states. Public services which were formerly provided by the federal government are now the states' responsibility. The states can readily assume those obligations because of their strong tax bases. Unlike the states, the Navajo Nation just recently began building its tax base, and the hotel occupancy tax contributes to that foundation.

The Navajo Nation's health and welfare interests are also implicated. The Navajo Nation assumed the responsibility of the Indian Health Service to assure public health in the form of housing code regulation, health inspections, and providing public health services to Atkinson's guests. The "welfare" interest is used here in the sense of protecting the public welfare, as has been previously elaborated in this opinion.

The second *Montana* exception also implicates Indian nation police power. Navajo Nation police power is the power to:

> adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws.

BLACK'S LAW DICTIONARY 1041 (5th ed. 1979). Cameron, Navajo Nation (Arizona) is not a "hole" within Navajo Nation territorial jurisdiction. The Navajo Nation has responsibilities to everyone who is present within its jurisdiction. The 1868 Navajo Treaty, in Article II, reserves authority to the Navajo Nation to admit non-Navajos or not and the United States specifically agreed that no person (with certain exceptions) "shall ever be permitted to pass over, settle upon, or reside in" the reservation. If we were to accept Atkinson's argument that the Navajo Nation lacks power over it and its guests, that would compromise the "pass over" authority reserved in the Treaty. Congress chose to add the area which includes Cameron to the Navajo "Reservation" in 1934, so all the provisions of the 1868 Treaty apply to that area.

IV.

The Navajo Nation Hotel Occupancy Tax generally applies to the class of hotel-keepers within the Navajo Nation. There is no justifiable reason to exclude Atkinson's facility from the tax. It would not be fair to other places of lodgings to exclude Atkinson while it accepts all the benefits of Navajo Nation governmental services without paying its fair share of the cost. We conclude that the incidence of the Navajo Nation Hotel Occupancy Tax is primarily upon tourists within Navajo Indian Country; there is no explicit federal prohibition against taxing Atkinson's non-Indian guests; and the Navajo Nation has the power and authority to require Atkinson to collect and remit the tax. We affirm the decision of the Navajo Tax Commission.

Filed this 22nd day of August, 1997.

/s/_____
Chief Justice of the Navajo Nation

/s/_____
Associate Justice

/s/_____
Associate Justice

APPENDIX E

BEFORE THE NAVAJO TAX COMMISSION
NAVAJO NATION
WINDOW ROCK, ARIZONA

Findings of Facts and Conclusions of Law
Case No. 95-008

IN THE MATTER OF:
ATKINSON TRADING CO., INC
Taxpayer

The above-entitled matter came on regularly for hearing on July 24-25, 1995, William J. Darling, Esq., appearing for the taxpayer and Marcelino R. Gomez, Esq., and Luralene Tapahe, Esq., appearing for the Office of the Executive Director, Navajo Tax Commission. Following the close of oral testimony and the presentation of exhibits, the parties submitted posthearing memoranda in support of their respective positions.

ISSUE

Is Atkinson Trading Company subject to the Hotel Occupancy Tax on the rental of rooms in property located on non-Indian fee land within the exterior boundaries of the Navajo Nation.

DISCUSSION

In July, 1992, the Navajo Nation Council enacted the Hotel Occupancy Tax (HOT) which became effective January 1, 1993. This tax is imposed on the rental of rooms within the Navajo Nation and the hotel/motel operators are charged with the responsibility of collecting and remitting the tax to the Navajo Nation.

Atkinson Trading Company (ATC), a New Mexico Corporation, conducts a hotel operation on fee land in Cameron, Arizona. This land is surrounded by the Navajo Nation. In addition to the hotel, ATC also operates a restaurant, cafeteria, gallery, curio shop, retail store and RV park on the property. Its guests are primarily non-Indian tourists. ATC has collected and remitted the HOT since its effective date; however, it has contended at all times that under the law it was not required to do so. Initially, in August, 1993, the taxpayer filed an action in the U. S. District Court seeking a declaratory judgment against the application of the HOT to its Cameron operation. This action was dismissed so that a full adjudication of the question could first be held in the tribal forum.

Following receipt of a private letter ruling from the Office of the Executive Director of the Navajo Tax Commission holding that ATC was subject to the provisions of HOT, ATC commenced this appeal, contesting the determination of that private letter ruling.

ATC contends that under *Montana* v. *U.S.*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d. 493 (1981), the Navajo Nation has no power to regulate the activities of nonmembers on non-Indian fee land unless it comes within one or both of the two exceptions set forth in that case:

> . . . To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or

> has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-566.

ATC presented testimony which showed that primarily all its guests were tourists who had traveled to Cameron by bus and who were visiting the Grand Canyon. The testimony was that while at the Cameron property they had no other contact with the Navajo Nation or its members, except for the Navajos employed at the property. The testimony showed that except for the Navajo members which it employs, ATC has a minimum amount of contact with Navajo members of the reservation, that in the past when it purchased arts and crafts from tribal members; it was in very small amounts; and, it was stated, that recently even this practice had been discontinued.

Testimony for ATC shows that it purchases electric, gas and telephone services from non-Navajo sources; that it uses water under a permit from the state of Arizona and that it has contracted with a non-Navajo company for the disposal of its solid waste.

The executive director first argues that ATC is precluded from litigating the question of whether the Navajo Nation can enforce its HOT on ATC because of a prior decision to which ATC was a party, *Ashcroft* v. *U.S. Department of Interior*, 679 F 2d. 196 (1982). In that case, the court held that ATC, even though located on fee land, was a reservation business subject to the Indian trader law and regulations. I do not believe litigation of this instant case is barred because of the principles of res judicata or collateral estoppel. The issues are not the same. In *Ashcroft*, the federal government was interpreting a federal law and the regulations promulgated thereunder as they applied to businesses located on the reservation. Here, the question is whether a tax law enacted by the tribe, not a federal law, can be enforced by the tribe on

non-members on non-Indian fee land. The tribe's status in *Ashcroft* was that of a dependent ward of the U.S., whose laws were being interpreted; in this case, the tribe is attempting to enforce the laws it has enacted in furtherance of its own self-governance and it must initially determine the extent of its taxing jurisdiction.

In *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, (1982), the Supreme Court discussed at length the power of Indian tribes to tax and the nature of that power. It stated:

> . . . The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. Id. at p.137.

Since the Cameron Trading Post is situated entirely within the exterior boundaries of the Navajo Nation and is not an independent governing body, recognized under either federal, state or municipal law, the Navajo Nation, in exercising its right of territorial management, has the power to assess a tax on non-Indians within its jurisdiction; i. e., within the exterior boundaries of the Navajo Nation.

Montana does not serve to limit this general power to tax which was recognized in *Merrion*. In *Montana*, the tribe sought to regulate hunting and fishing by non-Indians on non-Indian land. Here, the Navajo Nation is not attempting to regulate the conduct of ATC and its guests or the use of its

property; rather, the Navajo Nation is assessing a tax to help defray the cost of government within its jurisdiction.

Finally, even applying *Montana*, the evidence shows that the activities of ATC have a direct effect on the political integrity, economic security or health and welfare of the Navajo Nation. ATC has been adjudicated to be an Indian trader within the meaning of the federal statutes and its dealings on the Navajo Nation are subject to the requirements of that law and its regulations, all of which are aimed at protecting Indians when dealing with non-Indian traders. Police, fire and emergency medical services have been made available on various occasions to ATC and its guests. ATC and its guests enjoy the benefits of an organized society which is provided by the Navajo Nation as the primary governing body within the exterior boundaries of the Navajo Nation. The annual budget for government services on the Navajo Nation are approximately $250 million.

Having reviewed the testimony and the exhibits and the various memoranda filed by the parties, the hearing officer finds and concludes, as follows:

FINDINGS OF FACT

1. On July 30, 1992, the Navajo Nation Council enacted the Hotel Occupancy Tax (HOT), 24 N.T.C. §§ 700-741, effective January 1, 1993.

2. Pursuant to 2 N.T.C. § 3353, the Navajo Tax Commission is empowered to administer the tax laws of the Navajo Nation.

3. Atkinson Trading Company (ATC) is a New Mexico Corporation with its principal place of business in Gallup, New Mexico. Its president is a non-Indian.

4. The Navajo Nation is an Indian Tribe with its reservation located in portions of the states of Arizona, New Mexico and Utah.

5. ATC holds certain real property which is located in Cameron, Arizona in fee simple. By Act of Congress on June 14, 1934, Ch. 521, 48 Stat. 960-62, the exterior boundaries of the Navajo Nation were confirmed and this property is completely surrounded by Navajo Nation reservation trust lands.

6. ATC operates several businesses on the property, including a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. The property and businesses are known as the Cameron Trading Post.

7. ATC's businesses on the property are focused on the tourist market and deal almost exclusively with non-members of the Navajo Nation, who are primarily attracted to the property because of its proximity to the Grand Canyon.

8. ATC's guests travel across the Navajo Nation on federal highway 89 and state highway 64 to reach ATC's property. These highways are maintained by the Arizona Department of Transportation.

9. Delivery trucks from off reservation suppliers travel across the Navajo Nation to deliver their goods to ATC's operations.

10. ATC has, approximately 120 employees, 75-80 per cent of whom are tribal member.

11. Other than Navajo Nation police and fire department officers, ATC's contact with members of the Navajo Nation on the property consists of the employment of these members, a small amount of sales to members and a small amount of purchases of arts and crafts. This latter practice was discontinued in 1995, shortly before this hearing. All arts and crafts are currently purchased from off-reservation sources.

12. The Navajo Nation Police Department is the primary law enforcement agency in the Cameron area.

13. The Navajo Nation police is the only police department which maintains a substation in the area and it routinely patrols and performs security checks of the Cameron Trading Post.

14. When the emergency number 911 is dialed from ATC, the call is forwarded to the Navajo Nation Police Department.

15. The Navajo Nation Police Department and Fire Department have responded to calls and alarms from the Cameron Trading Post.

16. The Navajo Nation Fire Department is available to anyone who calls for assistance for emergency situations located on both fee and trust land within the Navajo Nation; the Navajo Nation Fire Department has responded to calls from tourists.

17. Accidents involving non-Indian tourists have occurred at the turnoff to the Cameron Trading Post and the junction of highways 64 and 89; and, Navajo Nation police and emergency medical services have responded to these accidents.

18. A variety of health services are offered to members and non-members by the Navajo Nation Division of Health, including health inspection of food vendors on all sites within the Navajo Nation.

19. The Navajo Nation Division of Health offered assistance in the investigation and education of the public regarding the Hantavirus outbreak in 1994.

20. The Navajo Nation Tourism Department has used tribal funds to provide facilities at several tourist areas on the Navajo Nation for the health and safety of tourists traveling across the Navajo Nation.

21. The Navajo Nation Government expends approximately $250 million annually in funding governmental services throughout the Navajo Nation. A portion of the funds used for this purpose is obtained through federal and state programs.

22. The Navajo Nation Government funds various government activities, including, economic development, community development, human resources, natural resources, public safety, health services, social services, education, legislative and judicial services and functions.

23. On July 30, 1992, the Navajo HOT was signed into law. The HOT purports to tax all persons who pay for the use or possession of a room or space which costs $2.00 or more per day in a hotel which is located within the exterior boundaries of the Navajo Nation.

24. The HOT requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission, file reports on the tax with the Navajo Tax Commission and pay penalties and interest for failure to do so.

25. The HOT is imposed on guests at all hotels within the exterior boundaries of the Navajo Nation without regard to whether it is located on trust or fee land.

CONCLUSIONS OF LAW

1. The HOT was properly enacted by the Navajo Nation Council and signed by the Navajo Nation President and is the statute governing this appeal.

2. The Navajo Tax Commission is the duly authorized body to administer the HOT.

3. Determinations made by the Office of the Navajo Tax Commission are presumed correct; the taxpayer must prove any asserted fact by a preponderance of the evidence.

4. The Navajo Nation, as a sovereign, may control economic activity within its exterior boundaries and may assess a tax against non-members to defray the costs of governmental services provided within those boundaries.

5. Pursuant to Act of Congress on June 14, 1934, Ch. 521, 48 Stat. 960-62 the exterior boundaries of the Navajo Nation were confirmed. ATC's Cameron property is within the exterior boundaries of the Navajo Nation.

6. ATC benefits from the governmental services provided generally to all persons within the exterior boundaries of the Navajo Nation. There is no showing that ATC was ever denied the governmental benefits available to others on the Navajo Nation because it is located on fee land and deals primarily with non-Indian members.

7. The tax assessed against ATC's guests and which ATC must collect and pay over to the Navajo Tax Commission is the same for all similar properties within the Navajo Nation, whether on fee or trust land.

8. That the Navajo Nation police, fire and emergency service units have responded to emergency and non-emergency situations at or near the Cameron Trading Post indicates that its activities and those of its guests do have a direct effect on the political integrity, economic security or health and welfare of the Navajo Nation.

9. That ATC was determined to be an Indian trader within the meaning of the applicable federal statute creates a presumption that its activities have a direct effect on the political integrity, economic security or health and welfare of the Navajo Nation.

10. The HOT is applicable to ATC and its properties located on fee land in Cameron, Arizona.

DATED this 15th day of November, 1995.

/s/_____
Chief Hearing Officer

BEFORE THE NAVAJO TAX COMMISSION
NAVAJO NATION
WINDOW ROCK, ARIZONA

Case No. 95-008

IN THE MATTER OF:
ATKINSON TRADING CO., INC.
Taxpayer.

ORDER

This matter having come on regularly for hearing before Henry L. Adams, Hearing Officer, on July 24-25, 1995, William J. Darling, Esq., appearing for the taxpayer and Marcelino R. Gomez, Esq., and Luralene Tapahe, Esq., appearing for the Office of the Executive Director, Navajo Tax Commission, and the Commission having reviewed the Findings of Fact and Conclusions of Law entered by the Hearing Officer,

IT IS HEREBY adjudged that the taxpayer, Atkinson Trading Company, Inc., is subject to the Navajo Hotel Occupancy Tax laws for taxable periods commencing January 1, 1993, and is properly charged with the collection and remittance of the tax to the Office of the Executive Director of the Navajo Tax Commission.

DATED this 16th day of November, 1995.

NAVAJO TAX COMMISSION

/s/_____
Chairman Joe Shirley, Jr.

/s/_____
Commissioner Victor Joe

/s/_____
Commissioner Derrick B. Watchman

/s/_____
Commissioner Elroy Drake

APPENDIX F

Title 24, Navajo Tribal Code, §§ 101 to 142

Chapter 1. HOTEL OCCUPANCY TAX

§ 101. DEFINITIONS

A. "Hotel" means a building in which members of the public obtain sleeping accommodations for consideration. The term includes a hotel, motel, tourist home, tourist court, lodging house, inn, or rooming house, but does not include a hospital, sanitarium, or nursing home.

B. "Branch" means any person owning, operating, managing or controlling any hotel.

C. "Person" means any organization, whether it be a sole proprietorship, partnership, joint venture, trust, estate, unincorporated association, corporation, or government (other than the government of the Navajo Nation), or any part, division, or agency of any of the foregoing, and an individual or group of individuals.

D. "Commission" means the Navajo Tax Commission.

E. "Fraud" has the same meaning as that established in the interpretation of Section 7206 of the United States Internal Revenue Code of 1954, as amended or renumbered.

F. "Levy" means seizure and distraint by any means.

G. "Period" means a calendar quarter or any other reporting period established by regulation.

H. "Regulations" means the regulations adopted by the Commission.

I. "Taxes" means the tax, and any interest, penalty, or costs, imposed or assessed pursuant to this chapter.

§ 102. TAX IMPOSED

A. A tax is imposed on a person who, under a lease, concession, permit, right of access, license, contract, or agreement, pays for the use or possession or for the right to the use or possession of a room or space in a hotel costing $2 or more each day.

B. The price of a room in a hotel does not include the cost of food served by the hotel and the cost of personal services performed by the hotel for the person except for those services related to cleaning and readying the room for use or possession.

§ 103. RATE OF TAX

The rate of the tax imposed by this chapter is five percent of the price paid for a room in a hotel. On January 1, 1994, the rate of the tax imposed by this chapter will increase to eight percent of the price paid for a room in a hotel.

§ 104. COLLECTION OF TAX

A branch owning, operating, managing, or controlling a hotel shall collect for the Commission the tax that is imposed by this chapter and that is calculated on the amount paid for a room in the hotel.

§ 105. EXCEPTION: PERMANENT RESIDENT

This chapter does not impose a tax on a person who has the right to use or possess a room in a hotel for at least 30 consecutive days.

§ 106. EXCEPTION: NAVAJO NATION

Nothing in this chapter shall be construed as imposing a tax on the government of the Navajo Nation. For the purposes of this chapter, the term Navajo Nation does not include tribal enterprises.

§ 107. RETURN AND PAYMENT

A. On the last day of each period, a branch required to collect the tax imposed by this chapter shall pay the Commission the tax collected during the preceding period, and at the same time shall file with the Commission a return stating:

1. The total amount of the payments made for rooms at the branch's hotel during the preceding period.

2. The amount of the tax collected by the branch during the preceding period;

3. Other information that the Commission requires to be in the return; and

4. Provided, that the Commission shall be authorized to assess against a branch responsible for the collection of taxes under this chapter, and that such assessments are presumed to be correct.

B. When it appears that the return filed by a branch does not reflect the tax due under this chapter, the Commission shall assess the branch for the deficiency, interest, penalties, and costs.

C. If no return is timely filed, the Commission is authorized to make an estimate of the tax due and to assess the branch responsible for collecting the tax due under this chapter for that tax, interest, penalties, and costs. This assessment is binding on the branch unless shown to be clearly erroneous.

D. If a branch fails to provide information within its possession or control which is relevant to a determination of taxes due and which it is required to provide under this chapter, the Commission is authorized to make an estimate of the tax due and to assess the branch for that tax, interest, penalties, and costs. This assessment is binding on the branch unless it is shown that the estimate, on the basis of the best information available to the Commission, was clearly erroneous or unless the Commission for other good cause shown relieves the branch from the operation of this paragraph.

E. Any taxes assessed shall become the liability of the branch responsible for the collection of the tax on the date due. If the branch is a corporation or a trust or a part thereof, then the corporation or trust shall be liable for the taxes. If the branch is an association, joint venture, or partnership, or a part thereof, then all the associates, participants, or partners both general and limited, shall be jointly and severally liable for the taxes. Subject to alteration by agreement between them, any associate, participant, or partner shall have a right of contribution from any other associate, participant, or partner for its proportional share of taxes paid, and shall have a lien on the interest of any such other for said taxes paid.

§ 108. ADMINISTRATIVE REGULATIONS

The Navajo Tax Commission is empowered to administer this tax and, to that end, shall be empowered to adopt rules and regulations, both substantive and procedural, orders implementing its decisions, rulings, and instructions such as may be necessary to the proper and efficient administration of this chapter.

§ 109. REIMBURSEMENT FOR TAX COLLECTION

The branch required to file a return under this chapter may deduct and withhold from the taxes otherwise due to the

Navajo Nation on the quarterly return, as reimbursement for the cost of collecting the tax, one percent of the amount of the tax due as shown on the return. If taxes due under this chapter are not paid to the Navajo Nation within the time required or if the branch required to file a return fails to file the return when due, the branch forfeits the claim to reimbursement that could have been taken if the tax had been paid or the return filed when due.

§ 110. EXTENSION OF TIME

A. A branch may request an extension of time for filing a return. The request must be made to the Commission in writing on or before the due date for the return. An extension may be granted at the discretion of the Commission.

B. The extension of time for filing will also constitute an extension of time for payment, unless expressly denied by the Commission. The Commission may in its discretion condition such extension on the payment of an estimated tax or the posting of a bond or provision of other security.

§ 111. RECORDKEEPING

A. Every branch shall keep full and true records of room receipts and taxes collected for each period, in accordance with regulations and shall make these records available at the request of the Commission.

B. In the case of a branch which is part of a corporation, partnership, association or other person, separate accounting records for the person must be maintained.

C. Records required to be kept under this section must be preserved for six (6) years beyond the time payment of tax is made, or if no payment is due, for six (6) years beyond the end of the period to which the records relate.

§ 112. INTEREST IMPOSED

Annual rates of interest shall be established in regulations. Interest shall be imposed on any unpaid amount of tax from the date the payment was due, without regard to any extension of time or way of payment, to the date payment is received. Interest at a lesser rate shall be paid on any overpayment of tax from the date the payment was made to the date the overpayment is refunded.

§ 113. PENALTIES FOR FAILURE TO FILE

A. If a branch fails to file a return by the time due, a penalty of ten percent (10%) of the tax due for the period, but not less than $100, shall be assessed against the branch.

B. An additional penalty of one percent: (1%) of the tax due for the period, but not less than $100, shall be assessed for each full month the return is overdue. Provided, that the additional penalty shall not, except as to the minimum amounts, exceed twenty-four (24%) of the tax.

C. A return filed on or before an extended date for filing is timely filed.

D. For good cause shown, the Commission may in its discretion relieve the branch from all or part of the penalties imposed under this section.

§ 114. PENALTIES FOR FAILURE TO PAY

A. A branch failing to pay an amount of tax by the time due shall be assessed a penalty of five percent (5%) of the amount of the underpayment.

B. An additional penalty shall be assessed of one-half percent (1/2%) of the underpayment for each full month payment is overdue but not to exceed thirty-six percent (36%) of the underpayment.

C. An amount paid on or before an extended date for payment is timely paid.

D. For good cause shown, the Commission may in its discretion relieve the branch from all or part of the penalties imposed under this section.

§ 115. PENALTIES FOR ATTEMPT TO EVADE OR DEFEAT TAX

A. Any branch understating the tax imposed by this chapter through negligence or intentional disregard of the rules and regulations (but without the intent to defraud) shall be assessed a penalty of $250, plus twenty-five percent (25%) of the underpayment of tax.

B. If any part of an understatement of tax is shown to be due to fraud, a branch shall be assessed a penalty of fifty percent (50%) of the underpayment of tax.

C. Any person who assists a branch in the fraudulent understatement of the tax due under this chapter shall be subject to a penalty of $500, plus twenty-five (25%) of the underpayment of tax. Any liability arising under this subsection shall be assessed and collected as a tax imposed by this chapter.

§ 116. CHARGES FOR ADMINISTRATIVE COSTS

A branch failing to pay any taxes at the time due may be charged for extraordinary administrative costs incurred in collecting the unpaid amount, including attorney fees and other costs of collection outside the jurisdiction of the Navajo Nation. These charges shall be assessed unless the Commission for good cause shown relieves the branch from the operation of this section.

§ 117. FAILURE TO COMPLY WITH CHAPTER

Any branch or other person obligated to pay taxes pursuant to this chapter, to designate an individual, to file a return, to provide information or documents or allow access to equipment within its possession or control, to furnish a surety bond of other security, or to comply with a lawful order of the Commission, and failing to do the same in accordance with the provisions of this chapter and the regulations, may have its rights to engage in productive activity within all or some of the Navajo Nation suspended, until compliance is made or for such shorter time as the Commission may provide. The Commission is empowered to order such suspension, provided that it shall first give the person to be suspended notice and an opportunity to be heard under § 131(A), and that any suspension may be appealed pursuant to § 131(B).

§ 118. INTERFERENCE WITH ADMINISTRATION

A. It shall be unlawful for any person, forcibly, or by bribe, threat or other corrupt practice, to obstruct or impede the due administration of this tax.

B. It shall be unlawful for any person willfully to fail to comply with a subpoena duly issued pursuant to § 136(B).

C. It shall be unlawful for any person to commit fraud, or knowingly to assist another in the commission of fraud, with the intent to evade or defeat the assessment or collection of any taxes imposed by this chapter.

D. It shall be unlawful for any person with knowledge and intent to falsely verify by written declaration any return or document.

E. Any Indian who violates any of the provisions of this section shall be guilty of an offense and, upon conviction, shall be sentenced to a term of imprisonment of not more than

180 days, or ordered to pay a fine not to exceed $500, or both, in accordance with the provisions of Title 17, Navajo Tribal Code.

F. Any non-member of the Navajo Nation who violates any of the provisions of this section may be excluded from land subject to the jurisdiction of the Navajo Nation in accordance with the procedures set forth in 17 NNC §§ 1901-1902.

G. Any person who violates any of the provisions of this section, or whose employees or agents violate any of the provisions of this section, may have its rights to engage in productive activity within all or some the Navajo Nation temporarily or permanently suspended. The Commission is empowered to order such suspension, provided that it shall first give the branch to be suspended notice and an opportunity to be heard under § 131(A), and that any suspension may be appealed pursuant to § 131(B).

§ 119. COLLECTION POWERS

A. The Commission shall have full power to collect any taxes assessed, including the power to attach and seize, in accordance with the provisions of this chapter, the assets of a branch or any property subject to lien, and any other powers available to the Navajo Nation for collection of debts owed it.

B. The Commission may request the Attorney General of the Navajo Nation to bring suit or enforcement proceedings in any court of competent jurisdiction. Provided, that the bringing of suit or enforcement proceedings shall not constitute a waiver of sovereign immunity and further provided that the Commission shall never be compelled to assert a claim for taxes in litigation by way of counter-claim or otherwise.

§ 120. SECURITY FOR PAYMENT

Whenever necessary to secure the payment of any taxes due or reasonably expected to become due, the Commission is authorized to require the branch to furnish an acceptable surety bond in an appropriate amount, payable to the Commission and conditioned upon the payment of the taxes therein identified no later than the date on which the liability becomes conclusive, or to furnish other acceptable security in an appropriate amount, and to require the branch to furnish additional security as it becomes necessary.

§ 121. LIEN FOR TAXES

A. If a branch fails to pay any taxes after demand by the Commission, the amount shall be a lien in favor of the Navajo Nation upon all property of rights to property of those liable for collecting the taxes due under this chapter.

B. The lien shall arise at the time the demand is made, shall attach to all property then owned and thereafter acquired, and shall continue until the amount of the lien is satisfied or released, and shall be effective against related persons without notice.

C. The lien shall not be effective as against other parties until notice is recorded in the Offices of the Commission in a form available for inspection by the public.

D. Provided, that with respect to a return filed, a lien shall arise for any unpaid taxes at the time of filing without further demand, and further provided that, if a lien shall arise according to the terms of the extension or stay.

§ 122. FORECLOSURE OF LIEN

A. The Commission may foreclose upon any or all items of property or rights to property subject to a lien for taxes by levying upon the same and, where such property does not consist of money, converting the same into money by any

appropriate means including the sale thereof or the operation under receivership of the business in which the property is used. Provided, that the Commission may be regulation prescribe the circumstances in which property or rights to property subject to a lien may be retained to offset the amount due, rather than being converted into money.

B. The Commission by regulation may provide for the redemption of property levied upon, within time limits and on terms specified.

C. The effect of a levy upon any branch for obligations due or payable by a branch liable to collect the tax due under this chapter shall be continuous from the date the levy is first made until the liability out of which the levy arose is satisfied.

D. Any person in possession of or obligated with respect to property or rights to property upon which a levy has been made who upon demand by the Commission, surrenders such property or rights to property (or discharges said obligation) to the Commission, shall be discharged from any obligation or liability to the person or persons liable for collecting the tax due under this chapter whose property or rights to property were levied upon.

E. The Commission shall carry out the provisions of this section under regulations comporting with due process, and no court proceeding shall be required in order for it to do so.

F. Proceedings for the sale of property substantially in compliance with the regulations shall be effective to transfer to the purchaser all right, title, and interest therein of the branch or person whose property or rights to property were levied upon. Provided, that where required by Federal law the sale of property shall not be final without the approval of the Secretary of the Interior.

G. The Commission may delegate and empower persons to carry out the procedures of this section, including officers of the Navajo Division of Public Safety, who shall render assistance in this regard on request by the Commission.

§ 123. APPLICATION OF PROCEEDS

A. Money levied upon by the Commission, or realized from property or rights to property levied upon, shall be applied first to the expenses of the levy and proceedings for the conversion of property, and then to the liability for costs, penalties, interest, and tax, in that order.

B. The balance, if any, shall be remitted to the person or persons who have claimed and proven legal entitlement thereto, provided that the Commission may set time limits or other reasonable conditions on the making and proving of such claims.

§ 124. RELEASE OF LIEN

A. Payment of the entire liability of the branch on account of whose liability the lien arose, shall operate to release the lien.

B. The payment of any part of the liability shall operate to reduce the amount of the lien by the amount paid.

C. Where a lien has been recorded and the Commission thereafter receives all or part of the taxes giving rise to the lien, the Commission will immediately cause a notation of the complete or partial release of the lien to be made in the record.

D. The Commission may in its discretion release liens on certain property without payment of all outstanding liabilities, for good cause and where the interests of the Navajo Nation are adequately protected by other security.

§ 125. INTERFERENCE WITH FORECLOSURE

A. It shall be unlawful for any person to remove from the jurisdiction of the Navajo Nation any property on which there is a lien for taxes which is effective against that person pursuant to § 121.

B. It shall be unlawful for any person in possession of or obligated with respect to property or rights to property which have been levied upon, to fail to surrender such property or rights or to discharge such obligation upon demand by the Commission therefor, except as to any part of the property or rights as is, at the time of the demand, subject to an attachment or execution under any judicial process.

C. Any person violating the provisions of this section shall be personally liable for the value of the property removed or not surrendered, or for the amount of the obligation not discharged, not exceeding the amount for which the levy was made. Any liability arising under this section shall be assessed and collected as a tax imposed by this chapter.

§ 126. TRANSFER OF BUSINESS

A. If a person buys substantially all of the assets of a branch within the Navajo Nation, that person shall withhold from the purchase price and pay to the Commission the amount of taxes due on account of activities of the branch prior to the purchase.

B. Any buyer failing to withhold taxes shall be personally liable up to the value of all the property acquired. Any liability arising under this section shall be assessed and collected as a tax imposed by this chapter.

C. The buyer shall make a written request and, within 30 days after the owner's records are made available for audit, the Commission shall send a notice to the buyer for the taxes due. Thereafter, the buyer shall not be personally liable under

this section for any taxes in excess of the amount stated in the notice, or for any such taxes if no notice is given within the time required.

D. No consent to the assignment or transfer of any lease or other rights to engage in productive activity within the Navajo Nation shall be granted by the Navajo Nation unless the Commission first certifies that taxes arising from said activity have been paid, or that payment has been adequately secured.

§ 127. MUTUAL ASSISTANCE AGREEMENTS

The Commission is authorized to negotiate mutual assessment and collection assistance agreements with any other tax jurisdiction. The agreements so negotiated will come into force only upon approval of the Intergovernmental Relations committee of the Navajo Nation Council.

§ 128. PROHIBITION OF SUITS

No suits for the purpose of restraining the assessment or collection of the taxes imposed under this chapter shall be maintained in any court by any person, whether or not such person is the person against whom such taxes assessed.

§ 129. STATUTE OF LIMITATIONS

A. Taxes imposed and required to be collected by this chapter shall be assessed within six (6) years after the return was filed, except as provided in subsections (B) and (D) of this section.

B. In the case of a fraudulent return with the intent to evade tax, no period of limitations shall apply.

C. Any action in a court or by levy for collection of taxes imposed under this chapter must be commenced within six (6) years of the assessment, except as provided in subsections (D) and (E) of this section.

D. The running of the period of limitations provided in subsections (A) and (C) of this section is suspended during any period the Commission is prohibited by any court from making an assessment or commencing collection proceedings and during any period of appeal under § 131.

E. The running of the period of limitations for collection may be suspended for any period agreed upon between the person and the Commission.

§ 130. PROCEDURE FOR REFUNDS

A. Any branch believing it has made an overpayment of taxes, within one (1) year after the time the alleged overpayment was made, may file a written claim for refund with the Commission. Provided, that it shall not be necessary to file a claim if the basis therefor has already been established under an abatement or asserted in an appeal under § 131, and further provided that an issue determined pursuant to an appeal may not be reopened by the filing of a claim for refund.

B. If an overpayment arises as a result of an action of a Navajo Nation, Federal, or state agency, or any court other than in an appeal under §131(B), wherein the action changes the factual basis upon which taxes were determined and paid, the time for filing a claim for refund shall be one (1) year from the date of such action.

C. The Commission shall rule on claims for refund according to procedures established in regulations. If a claim is denied in whole or in part, the branch may appeal pursuant § 131.

D. If the Commission determines, either on a claim for refund under this section, or in an appeal under § 131(A) on a claim or from an assessment, from which action no appeal is taken, that a branch has made an overpayment, the

Commission shall refund the overpayment, with applicable interest, to the branch.

E. Where the action of the Commission on a claim for refund under this section, or in the appeal under § 131(A) on a claim or from an assessment, is then appealed, the Commission shall make a refund of the overpayment determined by the order in that appeal, plus the applicable interest.

F. Provided, that if the branch entitled to a refund owes unpaid taxes, the refund shall be offset and reduced by such unpaid amounts.

G. Where an overpayment occurred through mathematical error, or other mistake, or verifiable change of fact, and within the times allowed under subsections (A) and (B) of this section, the Commission by form or regulation may provide for a credit by offset in a current period.

H. No refunds or credits for taxes paid shall be made or allowed to any branch by any court or agency other than as provided in this section, except that the Commission may by form or regulation provide for a refund or credit where taxes paid for one period thereafter requires adjustment on account of another tax for a concurrent period which is later determined and paid.

§ 131. PROCEDURE FOR APPEAL FROM ASSESSMENTS AND ACTIONS

A. Appeals from assessments and denials of refund shall be made first to the Commission according to procedures established in regulations. The Commission may permit or require one or more levels of review by its employees or delegates and may provide for hearings before hearing officers instead of or in addition to hearings before the Commission as a body, but the decision or recommendation of a hearing officer will be binding only to the extent adopted

by the Commission as a final decision. The failure duly to proceed to a next required level of review under this subsection shall constitute a waiver of any further appeal pursuant to this subsection or subsection (B).

B. Appeals from final actions of the Commission, including but not necessarily limited to assessments, denials of refund, and suspension orders, shall be made only to the Supreme Court of the Navajo Nation, according to procedures established in regulations, but in no case may an appeal of an assessment be taken to the Supreme Court until payment of the taxes assessed has first been made. Review of Commission actions in the Supreme Court shall be on the record made in the Commission and not de novo, and shall be limited to the determination whether the action of the Commission was not supported by the evidence, or was arbitrary, capricious, an abuse of discretion, beyond its authority, or otherwise contrary to applicable Navajo Nation or Federal law; except that were affirmation of the action would suspend a right of an appellant to engage in productive activity within the Navajo Nation, the appellant shall on request be entitled to a hearing *de novo* on any material question of fact. The Supreme Court shall be empowered to affirm, reverse, or modify a Commission action, or to remand the matter to the Commission for further action, and it may stay the effect of an order suspending a right to engage in productive activity, pending the appeal.

C. Procedures for staying the payment of taxes which are being appealed under Subsection A of this section may be established in regulations. The Commission in its discretion may condition the grant of a stay on the posting of a bond or provision of other security, or on the creation of a lien.

D. The Courts of the Navajo Nation are vested with jurisdiction: (1) over any and all persons subject to this chapter; and (2) to hear and determine any challenge to the validity of this chapter, either generally or as applied to any

person, provided that the provisions of this section and the regulations hereunder are complied with.

§ 132. ABATEMENT AUTHORITY

A. In response to a written request for abatement, but before any court acquires jurisdiction in the matter, or when an assessment is found to be incorrect, the Commission may abate any part of the assessment determined to have been incorrectly, erroneously, or illegally made.

B. Upon a compromise of liability and according to the terms of the closing agreement formalizing the compromise, the Commission shall cause the abatement of the appropriate amount of the assessment.

C. Abatements in excess of $1,000 shall be recorded in the offices of the Commission in a form available for public inspection. The record shall be maintained for a minimum of six (6) years after the date of abatement.

§ 133. CLOSING AGREEMENTS

A. If at any time after a final assessment of taxes, the Commission in good faith is in doubt of the liability of the person for the payment thereof, it may compromise the liability by entering in writing with the person a closing agreement that adequately protects the interests of the Navajo Nation, provided that such agreement shall be subject to approval by the Attorney General of the Navajo Nation.

B. If entered into after any court acquires jurisdiction of the matter, a closing agreement shall be part of a stipulated order or judgment disposing of the case.

C. As a condition for entering into a closing agreement, the Commission may require the provision of security for payment of any taxes due according to the terms of the agreement.

D. A closing agreement is conclusive as to the liability or nonliability for payment of taxes relating to the periods referred to in the agreement, except upon a showing of fraud, malfeasance, or misrepresentation or concealment of a material fact.

§ 134. CONFIDENTIALITY RULES

A. It shall be unlawful for any employee or former employee of the Commission to reveal to any individual, other than another employee or legal counsel of the Commission, any information contained in the return of any branch or any other information about any person acquired as a result of his or her employment by the Commission, except:

1. To an authorized representative of the branch;

2. To an employee of the government of the Navajo Nation or a member of the Navajo Nation Council authorized by the Commission to obtain information for use in connection with the governmental function of said employee or council member, provided that it shall be unlawful for the employee or council member to reveal said information except as permitted in this section;

3. To an authorized representative of another Indian tribe or a state, provided that the receiving tribe or state has entered into a written agreement with the Commission to use the information for tax purposes only and that the receiving tribe or state has enacted a confidentiality statute similar to this section;

4. To an authorized representative of a Federal agency, pursuant to the terms of a reciprocal agreement for the exchange of such information;

5. In an administrative or judicial proceeding to enforce any act or collect taxes, or in any matter in which the branch has put its own liability for taxes or the amount thereof at issue;

6. In compliance with the order of any court of competent jurisdiction in which the information sought is material to the inquiry;

7. In recording tax liens the property of a branch or collecting taxes by levy upon the property or rights to property of a branch;

8. In statistical releases not identifying the information provided as applicable to any single person;

9. To the extent of revealing whether a branch has or has not made a designation (and, if so, the name and address of that designee), or whether a person is or is not a designee (and, if so, by whom he has been designated); and

10. To the extent of revealing to the purchaser or intended purchaser of a branch or the property thereof the amount and basis of any unpaid taxes for which the seller is liable.

B. For purposes of this section, "employee of the Commission" shall include any person for whose services the Commission has contracted, provided that such person shall agree in the contract for services to abide by the provisions of this section.

C. Any employee or council member who violates any of the provisions of this section shall be subject to a fine of $50, or suspension for 30 days, or both.

D. The Commission may further restrict the disclosure of information and provide for compliance with the provisions of this section.

§ 135. EFFECTIVE NOTICE

A. Notice required to be given by the Commission may be effectively given to a person by mailing the notice to the individual last designated by the person, at the address shown

on the designation. Where a branch has not designated an individual, notice may be effectively given by mailing the notice to a person who is lessee, permittee, or assignee of property on which the productive activity at issue is conducted, or to a person holding a permit or license for the conduct of said activity. The foregoing is not intended to exclude the use of other methods of providing notice, including publication, so long as comporting with due process.

B. Public notice of a lien shall be effective as to all property and rights to property of a branch, business, or person so long as the description of the branch, business, or person is sufficient to put a reasonable person on inquiry to ascertain the existence of a lien on the property of said branch, business, or person.

§ 136. INVESTIGATIVE AUTHORITY

A. For the purpose of enforcing the provisions of this chapter, the Commission is authorized to inspect property, to examine and require the production of any pertinent records, books, information, or evidence, and to require the presence of any person and require testimony under oath concerning the subject matter of an inquiry, and to make a permanent record of the proceeding.

B. As a means for accomplishing the foregoing, the Commission is hereby vested with the power to issue subpoenas and summonses, pursuant to regulations comporting with due process.

§ 137. OATHS AND AFFIRMATIONS

Any agent or employee designated by the Commission for that purpose is authorized to administer such oaths or affirmations and to certify to such papers as may be necessary under this chapter or the regulations.

§ 138. RECEIPTS; DISBURSEMENTS

A. There is created in the treasury of the government of the Navajo Nation the Tax Administration Suspense Fund.

B. All money received by the Commission as taxes shall be deposited forthwith to the credit of said Fund.

C. Payment of claims for refund shall be disbursed from this Fund, except to the extent that there is a pertinent escrow established pursuant to subsection (E) of this section.

D. At the end of each month, the balance remaining in the Fund, after the payment of refunds under subsection (C) of this section, shall be transferred to the general fund or to such other funds or the credit of such accounts, as may be provided by Navajo Nation law.

E. Notwithstanding the foregoing, the Commission may in its discretion hold certain contested amounts in escrow, or direct some balance to be maintained in the tax Administration Suspense Fund from month-to-month in anticipation of additional payments which may have to be made therefrom.

§ 139. SEVERABILITY

If any provision of this chapter, as amended, or its application to any person or circumstance, is held invalid by a final judgement of a court of competent jurisdiction, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid

provision or application, and to this end the provisions of this chapter are severable.

§ 140. EFFECTIVE DATES

This chapter shall take effect upon approval by the Navajo Nation Council. The tax imposed by this chapter shall be due and payable for calendar quarters beginning January 1, 1993.

§ 141. REPEALS

All laws or parts of laws (or attachments thereto) which are inconsistent with the provisions of this chapter are hereby repealed, including, without limitation, any law purporting to waive any right of taxation by the Navajo Nation.

§ 142. ALLOCATION

A. The tax imposed by this chapter is imposed for the purposes of promoting tourism and tourism development.

B. To accomplish this end, this tax shall be retained in a special fund entitled the "Navajo Nation Tourism Fund" which shall be administered by the Navajo Tourism Department, and which shall, consistent with the laws of the Navajo Nation and utilizing the prudent person rule, be applied for the advancement of local tourism promotion, and to develop projects throughout the Navajo Nation. The Division of Economic Development and the Navajo Tourism Department, in compliance with the authority of the Economic Development Committee of the Navajo Nation Council and all other Navajo Nation laws, are hereby authorized to develop and recommend to the Budget and Finance committee of the Navajo Nation council the Fund's management plan. The development of said fund's management plan is not intended to convey appropriation authority to the Budget and Finance Committee of the Navajo Nation Council.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 99-126-BLG-JDS

GORDON ROSE AND JUNE ROSE, d/b/a QUILL GORDON FLY FISHERS BIG HORN COUNTY OUTFITTER, INC.; RECREATION DEVELOPMENT SYSTEMS, INC.; JOE S. BASSETT d/b/a SCHIVELY RANCH; MIRACLE TRUST, d/b/a LITTLE BIG HORN CAMP; AND BIG HORN BUSINESS ASSOCIATION, INC.,

Plaintiffs,

vs.

DENIS ADAMS, TAX COMMISSIONER OF THE CROW TRIBE; TYRONE TEN BEAR AND STEVE STEVENS, MEMBERS OF THE CROW TRIBAL TAX COMMISSION,

Defendants.

ORDER

* * * * *

Pending before the Court are cross-motions for summary judgment.

Background

This action was initiated by non-Indian individuals and non-Indian entities who own and operate businesses located on fee land within the exterior boundaries of the Crow Indian Reservation. Plaintiffs content that the Crow Tribe lacks civil authority to levy, assess, and collect a four percent (4%) resort tax on their respective businesses. They seek equitable relief to prohibit the Tribe from levying, assessing, and

collecting the tax. they also request a refund of all resort taxes paid under protest.

Plaintiffs in this case originally filed an action challenging the tax in Crow Tribal Court. After a four-day trial in January and February of 1997, the Crow Tribal Court issued findings of fact, conclusions of law, and final judgment, upholding the tax. On December 30, 1999, the Crow Tribal Court of Appeals affirmed the trial court. Thus, as defendants recognize, plaintiffs have exhausted their tribal court remedies and this case is ripe for review.

All of the plaintiffs in this case are non-Indians who own and operate recreation-oriented businesses on fee land within the exterior boundaries of the Crow Indian Reservation. Plaintiff Gordon Rose manages Quill Gordon Fly Fishers, a retail fishing shop that also provides lodging and guiding services. Plaintiff Joe Bassett owns Schively Ranch, a guest ranch located on fee land. Big Horn County Outfitters, Inc., is a retail fishing store that also provides lodging and guiding services. Recreation Development, Inc., is hunting and fishing lodge that sells fishing equipment and provides guiding services for fishing and bird hunting. Miracle Trust, doing business as Little Big Horn Camp, is a campground, motel, grocery store, gas station, and laundromat.

The Crow Tribe seeks to impose a four percent (4%) resort tax on the plaintiffs' "gross receipts from all goods and services sold or used on the Reservation in connection with the resort business." This is not an unfamiliar issue for the Court and one which the Court believes is controlled by its recent decision in *In re Haines*, 245 B.R. 401 (Mont. 2000) and the Ninth Circuit's opinion in *Big Horn County Electric v.* Adams, 2000 WL 966943 (9th Cir. June 14, 2000)

Discussion

In *Big Horn County Electric*, a case involving the Crow Tribe's attempt to tax nonmember property on the equivalent of non-Indian fee land, the Ninth Circuit recently reaffirmed a principle that this Court has long held true; that "post-*Strate* jurisprudence leaves no doubt that *Montana*'s framework applies in determining a tribe's jurisdiction over nonmembers on non-Indian fee land . . . ." *Big Horn County Electric*, 2000 WL 966943, p. 4. Indian tribes retain the inherent sovereign power to tax. *See*, *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 477 U.S. 134, 152-54 (1980) (hereafter "Colville"). However, as a general rule "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). The general rule is subject to the following two well-known exceptions:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted] A tribe may also retain power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66. The above-stated principles were reiterated in *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), where the court again recognized that,

> Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "do[es] not extend to the activities of nonmembers of the tribe." [*Montana*, 450 U.S. at 565].

As *Big Horn County Electric* instructs, the inherent sovereign power of an Indian tribe to tax nonmembers is not exempt from this general rule and its exceptions.

In this case, as they have in past tax cases, the defendants rely heavily upon *Colville* and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The Ninth Circuit recognizes that while *Merrion* and *Colville* "contain broad language regarding tribal taxation powers, neither case abrogates *Montana*'s main rule." *Big Horn County Electric*, 2000 WL 966943, p. 6. With respect to *Colville* "it directly addresses only Indian taxation power over transactions occurring on Indian land and in *dicta* appears to support *Montana*'s conclusion that tribal taxation power over property located on non-Indian feel land is extremely narrow." *Id.* Likewise, "*Merrion* actually lends support to *Montana*'s application" . . . "because to the extent it expresses an opinion about a tribe's taxation of property located on non-Indian fee land, its language indicates that such a tax would be an impermissible extension of tribal jurisdiction." *Id.*

The defendants' position is based upon the erroneous assumption that a nonmember is subject to the Tribe's jurisdiction simply because the nonmember does business within the exterior boundaries of the reservation, even if the business is conducted on nonmember fee land and does not significantly involve the tribe. As this Court has previously recognized in *Haines*, this position is tantamount to permitting the exercise of the Tribe's inherent sovereign power over the various nonmember plaintiffs simply by virtue of their status as landowners within reservation boundaries. *Montana* and its progeny specifically prohibit such exercise of sovereign power.

In its opinion, the Crow Tribal Court of Appeals indicates that the starting point should not be a list of limitations on tribal powers, but instead should be an assumption of the breadth of tribal powers which remain in place unless

specifically limited by Congressional enactment or treaty, or when inconsistent with tribal sovereign status. When determining the extent to which a tribe can exercise its inherent civil authority over nonmembers, on non-Indian fee land, this is an incorrect assumption. To the contrary, the general rule is that absent express authorization by federal statute or treaty, the inherent sovereign powers of a tribe extend to nonmembers only in limited circumstances.

The Crow Tribal Court of Appeals found that the tribal taxation issue is not readily addressed by *Montana* and *Strate* because the Crow resort tax is imposed on reservation-wide activities. The court noted that to attempt to parse the matter down to whether or not a particular taxable activity or event occurs on a fee or trust land ultimately would have the effect of undermining tribal taxation authority because it would restrict in type or breadth what could be considered valid tax. This Court disagrees with the Crow Tribal Court of Appeals' assertion that tribal taxation is not readily addressed by *Montana*. *Montana* is the path-marking case concerning the extent to which tribes can assert civil authority, including taxation, over nonmember on nonmember fee lands. The Ninth Circuit has specifically recognized that *Montana*'s framework applies in determining a tribe's jurisdiction to tax nonmembers on non-Indian fee land.

The Crow Tribal Court of Appeals was also concerned that the test set forth in *Montana* may have the effect of undermining tribal taxation authority because it would restrict the breadth of what could be considered valid taxation. The test for determining whether or not a tribe can exercise civil authority and tax a nonmember is not, and cannot, be dependent upon the restrictive effect the test may have upon the authority to tax. The defendants cannot ignore a Supreme Court articulated jurisdictional test simply because they do not like the effect of the test on their ability to impose a tax

on nonmembers. The jurisdictional test proposed by the Crow Tribal Court of Appeals was in error.

In applying *Montana*'s framework, this Court must first determine whether nor not there are any treaties or statutes which afford the Tribe the ability to tax the plaintiffs. Defendants have alerted the Court to no such treaties or statues, nor is the Court aware of any. Unless the defendants can establish one of the exceptions delineated in *Montana*, the activities of the plaintiffs on their respective fee lands are not within the Tribe's jurisdiction.

The first exception allows the Tribe to exercise civil authority over the activities of nonmembers who enter into consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements. In this case the defendants cannot point to, nor does there exist, any consensual relationship between the plaintiffs and the Tribe or its members which would allow the Tribe to tax transactions between nonmembers and the plaintiffs which occur on plaintiffs' non-Indian fee land.

In the past the defendants have argued that customers of the plaintiffs have engaged in consensual relationships with the Tribe by virtue of their voluntary presence on the reservation and their enjoyment of the benefits provided by the Tribe and funded by tax revenues. This Court rejected such argument because; (1) simple presence of the plaintiffs' customers on the reservation does not constitute a consensual relationship between the customers and the Crow Tribe and (2) the relationship, if any, between plaintiffs' non-Indian customers and the Crow Tribe is immaterial to whether the Tribe can assess and collect a tax from the plaintiffs for activities which occur on the plaintiffs' non-Indian fee land. For the Tribe to assert civil authority over the plaintiffs there must be a consensual relationship between the plaintiffs and the Tribe.

Even assuming the existence of a consensual relationship between plaintiffs' non-Indian customers and the Crow Tribe, taxing transactions between non-Indian customers and the non-Indian plaintiffs which take place on non-Indian fee land exceeds the inherent sovereign authority of the Tribe because the exercise of such authority extends only to regulation of the particular conduct, activity, or trade that gives rise to the consensual relationship between the Tribe and the nonmember. While non-Indian customers who enter tribal lands may have submitted to the Tribe's jurisdiction, with respect to activities on their non-Indian fee land, the plaintiffs have not.

Defendants again argue that the resort tax is valid because the plaintiffs do business "on the reservation" and the plaintiffs and their customers "benefit from the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137. The premise of this argument is that nonmembers should pay taxes to defray the cost of governmental services provided by the tribe because the nonmembers enjoy the benefits of such services. As this Court has previously recognized in *Haines*, the Tribe does not provide any significant governmental services. Instead, the vast majority of those services are provided, and paid for, by the Bureau of Indian Affairs, Indian Health Services, and other federal and county agencies. In response, the defendants and both Crow Tribal Courts are of the opinion that services provided, and paid for, by these "trustee agents" should be considered as services provided by the Tribe. It makes little sense to allow the Tribe to collect taxes to defray the cost of governmental services when those services are not being provided, or paid for, by the Tribe.

Moreover, as this Court has also previously recognized in *Haines*, the "advantages of a civilized society" argument

requires that the nonmember first be within the tribe's jurisdiction before the tribe can exercise its inherent sovereign authority to tax. This theory is not a jurisdictional test, but is instead simply a recognition of the source of the tribe's inherent sovereign power to tax once jurisdiction over a nonmember has been established. To establish jurisdiction the Court must apply *Montana*.

The second exception allows a tribe to exercise civil authority over the conduct of non-Indians on fee lands when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. The crow Tribal court and Court of Appeals determined that the resort tax is needed to defray the impact of tourism; the costs of providing services that benefit tourists; and the costs of remedying the impact of tourism. Essentially this is the advantages of a civilized society argument in disguise. In *Haines* the same argument was raised. As this Court previously determined, in order for the tribe to be able to exercise its sovereign authority to tax the plaintiffs, the tribe must show that the plaintiffs' sales to nonmembers, not their failure to pay the tax, threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Plaintiffs' sales to other nonmembers, occurring on nonmember fee lands, do not. the direct effect on the political integrity, economic security, health or welfare of the tribe is a prerequisite to the tribe's ability to exercise its sovereign power over a nonmember. The Tribe cannot first impose a resort tax and then attempt to justify the tax based upon the purported effect on the Tribe of the plaintiffs' failure to pay the tax.

Moreover, in *Big Horn County Electric,* the Ninth Circuit rejected the tribal officials claim that the utility tax was justified because "the revenues created by the utility tax finance important tribal services and are, therefore, essential to the continued well-being of the Tribe." *Big Horn County*

Electric, 2000 WL 966943, p. 5. The Court of Appeals wrote "to expand *Montana*'s second exception would effectively swallow *Montana*'s main rule, because virtually any tribal tax would then fall under the second exception, a result that the Supreme Court has never endorsed and which conflicts with the Supreme Court's view that tribal jurisdiction is limited." *Id.*

Plaintiff's request for a refund of taxes paid under protest must, however, be denied. *Big Horn County Electric*, 2000 WL 966943, p. 9-10.

Based upon the foregoing, IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is granted. For all the reasons set forth herein the Crow Tribe lacks civil authority to levy, assess, and collect the Resort Tax on plaintiffs' transactions with nonmembers, occurring on non-Indian fee land.

IT IS FURTHER ORDERED that the defendants, their successors, and anyone acting in concert with the defendants, are permanently enjoined from enforcing, levying, assessing, or collecting the Resort Tax from plaintiffs based upon transactions with nonmembers which occur on non-Indian fee land.

IT IS FINALLY ORDERED that plaintiffs' motion is denied to the extent plaintiffs seek a return of taxes paid under protest.

The Clerk of Court shall forthwith notify the parties of the making of this order.

DONE AND DATED this 7th day of August, 2000.

/s/_____
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

CV 99-126-BLG-JDS

GORDON ROSE & JUNE ROSE *et al.*,
Plaintiffs,

vs

DENIS ADAMS, TAX COMMISSIONER
OF THE CROW TRIBE, *et al.*,
Defts.

JUDGMENT

_____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXX Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Plaintiffs' Motion for Summary Judgment is granted. The Defendants, their successors, and everyone acting in concert with the defendants are permanently enjoined from enforcing, levying, assessing or collecting the Resort Tax from Plaintiffs based upon transactions with nonmembers which occur on non-Indian fee land.

FURTHER ORDERED that Plaintiffs' Motion is denied to the extent Plaintiffs seek a return of taxes paid under protest.

August 7, 2000

Lou Aleksich, Jr.
CLERK

(By) DEPUTY CLERK

APPENDIX H

Selected Tribal Tax Provisions

EASTERN BAND OF CHEROKEE TRIBAL CODE, CHAPTER 10 (TAXATION)

Section 105-30. Imposed.

A Privilege Tax is imposed on the operators of hotels, motels, tourist homes, tourist camps, campgrounds, rental cabins, and similar type businesses and persons who rent private residents and cottages to transients. This tax shall not apply to any private residence or cottage that is rented for less than 15 days in a calendar year or to any room, lodging or accommodations supplied to the same person for a period of 90 or more continuous days. This tax shall be in addition to any sales tax or levy now or hereafter imposed. (Ord. No. 317, 1-5-1995)

Section 105-31. Rate.

(a) The Privilege Tax for hotels, motels, tourist homes, residences and cottages shall be $1.00 for each room for every day or night it is rented.

(b) The Privilege Tax for tourist camps and campgrounds shall be $0.25 for each site for every day or night it is rented.

(Ord. No. 317, 1-5-1995)

* * * *

CROW TRIBAL CODE TITLE XIII (TAXATION)

Chapter 2 (Railroad and Utility Tax)

Section 203. Tax Imposed.

A. There must be a tax levied on all utility property located on tribal lands within the exterior boundaries of the Crow Reservation or used on tribal lands within the exterior boundaries of the Crow Reservation plus all utility property located on trust lands in the ceded strip which are considered part of the Crow Reservation.

B. The amount of the tax imposed each year shall be 3% of the assessed value of the utility properties subject to the tax. Any change in this rate shall not apply retroactively to a year prior to the year in which the change is approved.

* * *

Chapter 4 (Resort Tax)

4.01 Definitions.

For the purposes of this chapter, unless otherwise required by the context, the following definitions apply:

(a) "Resort business" includes any activity engaged in by any person or caused to be engaged in by a person with the object of gain, benefit or advantage, either directly or indirectly, and which involves providing goods or services to tourists or transient visitors to the Crow Indian Reservation. Resort businesses include, but are not limited to:

> (1) Campgrounds, dude ranches, guest ranches, hunting and fishing lodges, bed and breakfast establishments, souvenir shops, hotels, motels, and other lodging or camping facilities; and

(2) Hunting and fishing guide services and recreation equipment rentals received or used on the Reservation.

* * * *

4.02 Tax Imposed.

A tax is hereby imposed on the gross receipts from all goods and services sold or used on the Reservation in connection with a resort business.

4.03 Tax Rate.

The tax shall be at a rate of 4% of the gross receipts from all goods and services sold or used on the Reservation in connection with a resort business.

* * * *

THREE AFFILIATED TRIBES OF FORT BERTHOLD RESERVATION TRIBAL TAX CODE

Section 701. Statement of Purpose. Pursuant to the provisions of Chapter 1 of this Code, it is the policy of the Three Affiliated Tribes of the Fort Berthold Reservation to provide their members and non-members residing, doing business, or working within the jurisdiction of the Tribe with essential governmental services. To finance this governmental policy, the Tribe adopts in this Chapter a possessory interest tax, which will provide the Tribe with a portion of the revenues necessary to fund essential governmental services within their jurisdiction boundaries and which will benefit all individuals and businesses on the Reservation.

Section 702. Short Title. The tax levied by this Chapter shall be called the "Possessory Interest Tax" of real and personal property, which includes any right or interest, and actual ownership obtained in a tract of land, (trust, restricted or fee land), within the boundaries of the Fort Berthold Reservation (by lease, permit, contract, easement, right-of-way, deed, or other agreement). which authorizes a person . . . to use that real and personal property for business . . . , profit, or use, except as otherwise exempted Section 108 of this Code.

* * *

Section 705. Imposition and Rate of Tax. The Possessory Interest tax set forth herein shall be imposed on the ownership of possessory interest on January 1st of each year and shall be assessed at the rate of one percent (1%) of the assessed value of the possessory interest as determined and appraised in accordance with approaches/methodologies as utilized in Section 706.5 . . . .

* * * *

ASSINIBOINE & SIOUX TRIBES OF FORT PECK RESERVATION TRIBAL TAX CODE

Section 301. Definitions.

For purposes of this Chapter, unless the context specifically requires otherwise:

(a) "Utility" means any publicly or privately owned railroad; communications, telegraph, telephone, electric power or transmission line; natural gas or oil pipeline; or similar system for transmitting or distributing services or commodities; but does not include roads or highways constructed or maintained by the United States, the Tribes or the State of Montana or a subdivision thereof.

* * *

Section 303. Tax Imposed.

A tax of three percent (3%) of the value on each assessment date of all utility property is hereby imposed, provided however that all cooperative rural electrical or cooperative rural telephone associations organized and operated not for profit shall pay a tax of one percent (1%) of such value.

* * * *

BLACKFEET TRIBAL ORDINANCE PROVIDING FOR A POSSESSORY INTEREST TAX. NUMBER 80, AS AMENDED BY RESOLUTION NO. 213-87 (1987)

* * *

Section 4. RATE OF TAX.

The possessory interest tax set forth herein shall be assessed at the rate of four percent (4%) of the market value of the possessory interest as determined and computed in accordance with this Ordinance. Said rate of tax shall be and remain the same as herein established unless modified by an ordinance of the Blackfeet Tribal Business Council.

* * *

Section 11. EXEMPTIONS.

1. No possessory interest which consists of a service line of a utility which exclusively serves the Blackfeet Indian Reservation or of a delivery or distribution facility of a utility which exclusively serves the Blackfeet Indian Reservation shall be subject to this tax. Utility lines passing through the Reservation and providing service beyond the Reservation boundaries shall be subject to this tax.

* * * *

Supreme Court, U.S.
FILED
OCT 23 2000
OFFICE OF THE CLERK

(2)

No. 00-454

In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

vs.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION, AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED

Whether an Indian tribal government which provides a broad range of governmental services may tax a transaction between two non-Indians who benefit from police protection and other governmental services provided by the Indian tribal government on fee land within the reservation?

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I. STATEMENT OF THE CASE

Petitioner, Atkinson Trading, is a New Mexico corporation operating several businesses on its property, located within the exterior boundaries of the Navajo Indian Reservation in Arizona. The property includes a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. Petitioner challenges the authority of respondents, the Navajo Nation, to impose the Hotel Occupancy Tax on Petitioner's overnight guests. The courts below upheld validity of the tax.

This holding is consistent with this Court's recognition of an Indian nation's inherent taxing authority as an exception to the general rule illustrated in *Montana v. United States*, 450 U.S. 544 (1981) and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The Tenth Circuit's ruling accurately comprehended this inherent taxing authority in upholding the validity of the Hotel Occupancy Tax. *Atkinson Trading Co. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000).

II. STATEMENT OF FACTS

Petitioner, Atkinson Trading Company ("Atkinson Trading"), is a New Mexico Corporation. Pet'r App. 95a.[1] Atkinson Trading holds certain real property which is located in Cameron, Arizona in fee simple. Pet'r App. 96a. Atkinson Trading operates several businesses on the property, including a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. The property and businesses are known as the Cameron Trading Post. Pet'r

---

[1] Petitioner's Appendix shall be referenced as Pet'r App..

App. 96a. Atkinson Trading has also engaged in sales to members of the Navajo Nation and purchased arts and crafts from them. Pet'r App. 96a. Atkinson Trading has approximately 120 employees, 75-80 per cent of whom are Navajo tribal members. Pet'r App. 96a. The Navajo Nation is an Indian Tribe with its reservation located in portions of the states of Arizona, New Mexico and Utah. Pet'r App. 96a. By Act of Congress on June 14, 1934, Ch. 521, 48 Stat. 960-62, the exterior boundaries of the Navajo Nation were confirmed and Petitioner's property is completely surrounded by Navajo Nation reservation trust lands. Pet'r App. 96a.

Atkinson Trading's businesses on the property are focused on the tourist market and deal primarily with non-members of the Navajo Nation, who are primarily attracted to the property because of its proximity to the Grand Canyon. Pet'r App. 96a. Atkinson Trading's guests travel across the Navajo Nation on federal highway 89 and state highway 64 to reach Atkinson Trading's property. Pet'r App. 96a. These highways pass over rights-of-way granted by the Navajo Nation. The highways are jointly patrolled by the Arizona state and Navajo tribal police but the tribal police force is the primary provider of police protection to the Trading Post and the immediate vicinity. Pet'r App. 57a. A substation of the Navajo Nation police department is located in Cameron. Pet'r App. 57a. When the emergency number 911 is dialed from Atkinson Trading, the call is forwarded to the Navajo Nation Police Department. Pet'r App. 97a. The Navajo police enforce a non-loitering policy at the Trading Post. The Navajo police provide assistance to motorists on the highways leading to the Trading Post,

including giving directions and changing flat tires. Pet'r App. 57a.

The Navajo fire department and the Bureau of Indian Affairs fire departments, both located in Tuba City 25 miles away, provide the primary response to calls from the Cameron area. There has been at least one fire at the Trading Post to which the Navajo fire department responded. Pet'r App. 57a.

Emergency medical services in the Cameron area are provided by a Navajo Nation entity called the Emergency Medical Service Department. This entity responds to all calls within the Navajo Nation including numerous calls from the Cameron area. Pet'r App. 58a. The tribal police and fire departments have also responded to many calls concerning auto accidents in the Cameron area involving both Navajo and non-Navajos. Pet'r App. 58a.

The Navajo Nation provides a variety of health services to members and non-members by the Navajo Nation Division of Health, including health inspection of food vendors on all sites within the territorial jurisdiction of the Navajo Nation. Pet'r App. 97a. The Navajo Nation Tourism Department has used tribal funds to provide facilities at several tourist areas on the Navajo Nation for the health and safety of tourists traveling across the Navajo Nation. Pet'r App. 97a. The Navajo Nation Government funds various government activities, including, economic development, community development, human resources, natural resources, public safety, health services, social services, education, legislative and judicial services and functions. Pet'r App. 98a.

On July 30, 1992, the Navajo Hotel Occupancy Tax was signed into law by the President of the Navajo Nation. The Hotel Occupancy Tax purports to tax all persons who pay for the use or possession of a room or space which costs $2.00 or more per day in a hotel which is located within the exterior boundaries of the Navajo Nation. Pet'r App. 98a. The Hotel Occupancy Tax requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission, file reports on the tax with the Navajo Tax Commission and pay penalties and interest for failure to do so. Pet'r App. 98a. The Hotel Occupancy Tax is imposed on guests at all hotels within the exterior boundaries of the Navajo Nation without regard to whether it is located on trust or fee land. Pet'r App. 98a. The rate of the tax is 8% of the price of the room. 24 N.N.C. § 103.

III. SUMMARY OF ARGUMENT

Petitioner, Atkinson Trading, alleges the Tenth Circuit panel's decision conflicts with two decisions of the U.S. Supreme Court. Pet. at 10. *Montana v. United States* concerned the ability of the Crow Tribe to regulate hunting and fishing by non-members on lands owned in fee simple by non-members, where the land was located within the exterior boundaries of the Crow Reservation. *Montana v. United States*, 450 U.S. 544 (1981). The United States Supreme Court's acknowledgment of an Indian nation's inherent taxing authority is clearly depicted in the cases that form the basis of the exception to the *Montana* rule cited by this Court in its decision. The inherent authority exception interpretation of *Buster v.*

Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), in *Montana* has been consistently recognized by the U.S. Supreme Court in other cases. In *Merrion*, the Court reiterated that the Jicarilla's power to tax was not simply based on the tribe's right to exclude but was an inherent power of the Jicarilla Tribe. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143-144 (1982). The relevant question is twofold: 1) whether Atkinson Trading avails itself of the "substantial privilege of carrying on business on the reservation" or 2) whether Atkinson Trading's guests "benefit from police protection and other governmental services" provided by the Navajo Nation, as well as from the " 'advantages of a civilized society assured by the existence of tribal government.' " *Merrion*, 455 U.S. 130, at 137-38, *quoting Mobil Oil Corp. v. Commissioner of Taxes*, 455 U.S. 425, 437 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940), and *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980) (*quoting Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)).

This Court characterized its understanding of the type of cases that fit within the first *Montana* inherent authority exception for "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997). It is abundantly clear that the trilogy of decisions in *Montana, Merrion* and *Strate* recognize a tribe's inherent right to impose taxes for the privilege of engaging in economic activity within its borders. All of these cases have cited to *Buster* as being an exception to *Montana* rule. *Montana* and *Strate* do not limit a tribe's taxing

authority over noncitizens within fee land. In fact, they both recognize the tribal taxing authority as an inherent authority exception to the general rule in *Montana*.

The *Big Horn* decision does not conflict with the Tenth Circuit's decision in this case. *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). Actually, the *Big Horn* court would validate the Navajo Hotel Occupancy Tax. *Big Horn* disallowed a tribal ad valorem property tax. *Big Horn*, at 953. The Navajo Hotel Occupancy Tax is not an ad valorem property tax but an excise tax on activities of taxpayers.

This case is simply not worthy of certiorari. The law in this area is very clear and has been since the *Buster* decision.

IV. ARGUMENT

NEITHER *MONTANA* NOR *STRATE* LIMIT THE NAVAJO NATION'S TAXING AUTHORITY IN THIS CASE.

A. *Montana v. U.S.* recognizes the inherent taxing jurisdiction of an Indian nation over Indian Traders and their economic activities as a consensual exception.

Montana v. United States concerned the ability of the Crow Tribe to regulate hunting and fishing by non-members on lands owned in fee simple by non-members, where the land was located within the exterior boundaries of the Crow Reservation. *Montana v. United States*, 450 U.S. 544 (1981). This Court's recognition of an Indian nation's inherent taxing authority is best illustrated by reviewing the cases that form the foundation of the

exception to the *Montana* rule cited by the Court in its decision. The Court in *Montana* acknowledged the inherent taxing authority of Indian nations by declaring:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-566.

The *Montana* Court's decision explicitly held that a tribe may regulate, through taxation. *Id.* at 565. One of the cases cited by this Court for the *Montana* inherent power exception was *Buster v. Wright*. *Id.* at 565. In *Buster*, C.W. Buster, a non-Indian, owned and operated a grocery store located on fee land which was surrounded by reservation trust land. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). The Eighth Circuit held that C.W. Buster, the trader was subject to a tribal tax imposed by the Creek Nation and that the tribe could employ the Secretary of the Interior to enforce it. 135 F. at 954.

The authority of the tribe to tax the non-Indian trader, C.W. Buster, was not based on the tribe's ability to

exclude Mr. Buster from the exterior boundaries of the Creek Indian Reservation. Instead the authority was found to be inherent, and the fee status of the land was simply not relevant to the question of tribal power to tax. The *Buster* court stated:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

135 F. 950. The *Buster* Court recognized that a tribal government has the power to tax the economic activity of those who choose to engage in economic activity within the exterior boundaries of an Indian reservation. Such economic activities are subject to the tribe's taxing authority just like every other economic entity. There is no express Congressional act that specifically exempts Indian traders from their responsibility to collect or pay Indian taxes. Like the Indian Trader in *Buster,* Atkinson is subject to conditions which the Navajo Nation may choose to put upon its privilege of doing business within the reservation. Like the Creek Nation in *Buster,* the Nation possesses the lawful authority to require the payment of this tax as a condition precedent to the exercise of the privilege of trading within its borders. *Buster,* at 949. The authority of the Navajo Nation to prescribe the terms upon which noncitizens may transact business within its

borders did not have its origin in an act of Congress, treaty, or agreement of the United States. Instead, it is one of the inherent and essential attributes of its original sovereignty. *Merrion,* 455 U.S. at 141. It is an inherent right of the Navajo Nation, indispensable tc its autonomy as a distinct tribe or nation, and it remains an attribute of its government. *Buster,* at 950.

It is quite notable that Atkinson Trading has been determined to be an Indian Trader under 25 U.S.C. §§ 261 *et seq.* and 25 C.F.R. § 141. *Ashcroft v. United States Dept. of Interior,* 679 F.2d 196, 199 (9th Cir. 1982). As an Indian Trader, Atkinson's circumstance is virtually identical to that of C.W. Buster. In addition to its trading activities, Atkinson Trading operates several other businesses on the property, including a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. The property and businesses are known as the Cameron Trading Post. Pet'r App. 96a. The activities carried on by Atkinson Trading are very similar to the activities carried on by C.W. Buster and there is no legitimate way to distinguish this case from *Buster.*

1. *Merrion v. Jicarilla Apache Tribe*

The inherent authority interpretation of the *Buster* decision has been consistently acknowledged by this Court in other cases. Previously, the Court recognized that the Jicarilla Apache Tribe's power to tax was not simply based on the tribe's right to exclude but was an inherent power of the Tribe. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 143-144 (1982). This Court in *Merrion* explained:

> Finally, the decision in *Buster v. Wright* actually undermines the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands. Under this theory, a non-Indian who establishes lawful presence in Indian territory could avoid paying a tribal tax by claiming that no residual portion of the power to exclude supports the tax. This result was explicitly rejected in *Buster v. Wright*. In *Buster*, deeds to individual lots in Indian territory had been granted to non-Indian residents, and cities and towns had been incorporated. As a result, Congress had expressly prohibited the Tribe from removing these non-Indian residents. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained its power to tax. The court concluded that "[neither] the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners." 135 F., at 952. This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.

Id. at 143-144.

The power of taxation rests on a tribe's territorial jurisdiction, not on the power to exclude nonmembers from the reservation. *Buster*, 135 F. 947, at 950, *Merrion*, 455 U.S. 130, at 142. This Court in *Merrion* explained:

> . . . there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.

Merrion, 455 U.S. at 142. Under this analysis, the fact that Atkinson Trading is a nonmember conducting business with mostly nonmembers on fee land has no bearing on the Navajo Nation's power to tax, so long as the activity to be taxed is within the governmental jurisdiction of the tribe. A "Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government." *Merrion*, 455 U.S. at 144.

The analysis in *Merrion*, and its discussion of past cases upholding the tribal power of taxation over non-Indians, indicates that the relevant question is not land status, but is, rather twofold: 1) whether Atkinson Trading avails itself of the "substantial privilege of carrying on business on the reservation" or 2) whether Atkinson Trading's guests "benefit from police protection and other governmental services" provided by the Navajo Nation, as well as from the " 'advantages of a civilized society assured by the existence of tribal government.' " *Merrion*, 455 U.S. 130, at 137-38, *quoting Mobil Oil Corp. v. Commissioner of Taxes*, 455 U.S. 425, 437 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940), and *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228

(1980) (*quoting Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979). In sustaining tribal taxes over non-Indians in *Merrion*, the Supreme Court stated:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

Merrion, 455 U.S. 130, at 137. In Atkinson Trading's case, although located on fee land, its business is clearly on the reservation, within the Navajo Nation's territorial jurisdiction. *Ashcroft*, 679 F.2d 196, at 199. The Navajo Nation funds a wide variety of governmental expenditures. Pet'r App. 96-97a. Many of these governmental services have been found to benefit either Atkinson Trading or its guests in addition to other residents of the Navajo Nation. Pet'r App. 96-97a. It is obvious that Atkinson Trading "benefit[s] from police protection and other governmental services" provided by the Navajo Nation, as well as from the " 'advantages of a civilized society assured by the existence of tribal government.' " *Merrion*, 455 U.S. 130, at 137-38.

This reasoning was followed in later tribal tax cases where the Ninth Circuit stated "The relevant question is

not whether Burlington Northern's activities on the reservation were consensual or subject to control by the Tribes but whether Burlington Northern receives benefits from the Tribes for which it may be taxed." *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899, 904 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). Atkinson engages in business activity, and Atkinson's guests also travel across the Navajo Nation to Atkinson's business location, all within the territory of the Navajo Nation. Pet'r App. 96a. Thus, the Navajo Nation may tax, because Atkinson Trading's guests have consented to the jurisdiction of the Navajo Nation by entering the Navajo Nation territory where the Navajo government provides the "intangible benefits of a civilized society, . . . and the tangible benefits of police and fire protection." *Burlington Northern R.R.*, 924 F.2d 899, at 904. This territory-based analysis respecting the tribal power to tax is consistent with the treatment of the state power to tax. Indeed, the Supreme Court in *Merrion* did measure tribal taxing power by standards regularly applied to states. So long as the tax is fairly apportioned, and is levied upon those whose activity presents a nexus with the taxing entity, there is nothing exceptional in requiring Atkinson and its guests to contribute through taxes to the general cost of tribal government. *Merrion*, 455 U.S. 130, at 138, 156; *citing to, Commonwealth Edison v. Montana*, 453 U.S. 609 (1981), and *quoting Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Simply put, so long as the non-Indian is within the governmental territory of the tribe, and the non-Indian enjoys the benefits of a civilized society, the tribe is rightly empowered to tax to pay for the cost of providing governmental services. The Navajo Nation does indeed

provide police, fire, and other essential governmental services to the residents of and visitors to the Navajo Nation. Pet'r App. 97a; Pet'r App. 66-67a; *Atkinson v. Gorman*, No. 97-1261 (D.N.M. filed Aug. 21, 1998).

2. *Strate v. A-1 Contractors*

More recently, this Court reiterated the inherent authority of Indian nations to impose their taxes on nonmembers on fee lands. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *Strate* concerned the adjudicatory authority of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation over a personal injury action with nonmember defendants. The accident that generated the personal injury actions occurred on a highway maintained by the State running through the Fort Berthold Indian Reservation. Neither of the parties to the auto accident were members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation. This Court held that the specific right-of-way grant in *Strate* was equivalent to non-Indian land for nonmember governance purposes. *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997). This Court then determined that the highway accident did not meet either of the two retained inherent sovereignty exceptions identified in *Montana*. *Strate*, at 457-459.

This Court held that the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation did not possess adjudicatory authority over the personal injury claim where both of the automobile accident participants were not members of the Tribe. In making its determination, the Court reinforced the validity of the

inherent tribal taxing authority over nonmember economic activity on fee lands within the exterior boundaries of an Indian reservation. *Strate*, at 457.

This Court in *Strate* recognized that the inherent civil authority of Indian tribes and their courts extended to nonmembers who enter relationships with the tribe or its members, citing *Montana*, 450 U.S. at 565, 566; to non-Indians entering the reservation to engage in economic activity citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980). *Strate*, at 457. This Court clearly explained the type of cases that fit within the first *Montana* inherent authority exception as follows:

> Montana's list of cases fitting within the first exception, see 450 U. S., at 565-566, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U. S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U. S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville*, 447 U. S., at 152-154 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law [*35] or necessary implication of their dependent status").

Strate, at 457. It is abundantly clear that the trilogy of decisions in the cases, *Montana*, *Merrion* and *Strate* recognize a tribe's inherent right to impose taxes for the privilege of engaging in economic activity within its borders. All of these cases recognize the factual situation in *Buster* as being an exception to the *Montana* rule. The factual situation in this case calls for the identical result.

B. THE NAVAJO HOTEL OCCUPANCY TAX WOULD BE ALLOWED UNDER *BIG HORN*.

The Ninth Circuit decision has held that the tribal power to tax does not authorize tribal taxation of property used for utility purposes pursuant to a right of way granted through a reservation. *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). In so doing, the panel overruled *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), which upheld tribal government taxation of utility property located within reservation rights of way. The panel based its ruling and its overruling of *Burlington Northern*, on the intervening Supreme Court decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *Id.* at 950.

The Ninth Circuit erred in invalidating the tribal tax at issue in *Big Horn* and in finding that the decision in *Burlington Northern* had been undermined by *Strate*. *Big Horn* at 953. *Strate* deals with torts, not taxes, and with adjudication, not taxation. A tribe's power to tax is broader than its civil adjudicatory jurisdiction over nonmembers. *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 2000). It simply is not applicable to this case nor to *Big Horn*. *Strate* involved a tort action

over which tribal adjudicatory authority was disputed. It concerned an accident between non-Indians on a state owned public highway, a situation the Supreme Court characterized as "distinctly non-tribal in nature." 520 U.S. at 457. As Justice Souter stated for a unanimous Supreme Court in *El Paso Natural Gas Corp. v. Neztsosie*. 526 U.S. 473, 482 n.4 (1999), "*Strate* dealt [only] with claims against non-members arising on state highways."

In contrast, this case involves a dispute over tribal legislative authority to tax activities within non-Indian-owned fee lands located within the exterior boundaries of the Navajo Nation. This distinction is entirely compatible with the cases dealing with tribal government taxation on fee lands. For example in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), specifically cited with approval by the Supreme Court in *Strate*, 520 U.S. at 457, the court upheld a tribal permit tax upon non-members for the privilege of conducting business on fee lands within the tribe's borders. 135 F. at 952-54. And most recently, in a post-*Strate* decision, the Ninth Circuit in *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), on remand from the Supreme Court for further consideration in light of *Strate*, expressly distinguished this taxing power from the question of civil adjudicatory authority over non-members that *Strate* presented. *Id.* at 1063 (citing *Merrion*, 455 U.S. at 141-42). In *Red Wolf*, the court concluded that the tribal taxing power over rights-of-way previously upheld by this Court in *Burlington Northern*, is "broader than its civil adjudicatory jurisdiction over non-members." *Id.* at 1064. These principles have equal application to this case and *Big Horn*.

Therefore, the panel erred in ruling that *Strate* undermined tribal taxing power. *Big Horn,* at 953. There is nothing in *Strate* that professes to modify, much less overrule, the principles of *Merrion*. In fact, *Strate* does not address any question concerning tribal legislative power but simply holds that tribal adjudicatory authority over non-members *does not exceed* tribal legislative jurisdiction, 520 U.S. at 453. *Red Wolf* correctly concludes that the tribal tax power is broader than tribal civil adjudicatory jurisdiction over non-members. 196 F. 3d at 1063. Contrary to the *Big Horn* decision, neither *Strate* nor *Red Wolf* undermines the existence of tribal government taxing power over the fee lands involved here.

Finally, the *Big Horn* decision does not conflict with the Tenth Circuit's decision in this case. The *Big Horn* court would validate the Navajo Hotel Occupancy Tax. *Big Horn* disallowed a tribal ad valorem property tax. *Big Horn,* at 953. The Navajo Hotel Occupancy Tax is not an ad valorem property tax but an excise tax. An ad valorem tax is a tax on the value of property. BLACK'S LAW DICTIONARY 51 (6th ed. 1990). An excise tax is a tax imposed upon performance of an act, the engaging in an occupation, or the enjoyment of a privilege. BLACK'S LAW DICTIONARY 563 (6th ed. 1990). The *Big Horn* court recognized this distinction when it stated "An ad valorem tax on the value of Big Horn's utility property is not a tax on the activities of a nonmember, but is instead a tax on the value of property owned by a nonmember, . . . " *Big Horn,* at 951. The *Big Horn* Court also acknowledged that the Crow Tribe could impose an excise tax when it stated " . . . the Tribe is free to adopt a different tax scheme that complies with *Montana*." *Big Horn* at 951. The Navajo Hotel Occupancy

Tax is the type of excise tax that the *Big Horn* Court had in mind. The ad valorem tax at issue in *Big Horn* is not the same type of tax at issue in this case.

V. CONCLUSION

Under the existing law of this Court, the Navajo Nation clearly possesses taxing jurisdiction in this case. Atkinson and its guests benefit from police protection and other governmental services provided by the Navajo Nation. Because these non-Indians benefit from the advantages of a civilized society, there is nothing exceptional in requiring them to contribute to the cost of government through taxes. Therefore, the Navajo Nation may properly apply and enforce the Hotel Occupancy Tax. The *Big Horn* decision does not conflict with the Tenth Circuit's decision in this case. The *Big Horn* court would validate the Navajo Hotel Occupancy Tax. *Big Horn* disallowed a tribal ad valorem property tax. *Big Horn*, at 953. The Navajo Hotel Occupancy Tax is not an ad valorem property tax but an excise tax.

Wherefore, Respondents respectfully request that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted this 23rd day of October, 2000.

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(6)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents' brief in opposition confirms the need for review by this Court. First, respondents' argument demonstrates the considerable confusion among courts and litigants alike regarding tribal taxation of nonmembers. Respondents' brief does not defend the balancing test adopted by the court of appeals to uphold the tribal tax on hotel guests. It does not attempt to present a coherent theory as to how this case involves a consensual relationship between the hotel guests and the tribe as required by the first exception to the general rule of *Montana v. United States*, 450 U.S. 544 (1981). It does not attempt to reconcile the language of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), with the analysis of tribal authority over nonmembers more recently articulated by this Court in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Instead, respondents' brief asserts a blanket claim that the Navajo Nation has the right to tax all non-Indians entering the reservation under a third "inherent authority" exception purportedly derived from *Montana*. In short, respondents' brief confirms rather than dispels the doctrinal tension.

Second, respondents' brief illustrates the split between the Ninth and Tenth Circuits. Respondents rely at a critical point in their argument on the Ninth Circuit's decision in *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). But that decision has been expressly overruled by the Ninth Circuit itself. *See Big Horn Elec. Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000). Moreover, respondents do not dispute that the sequence of decisions in the principal circuits for tribal litigation has caused considerable uncertainty over the tax powers of the tribes – uncertainty which is confirmed by the several *amicus curiae* briefs filed here. This Court should grant the petition to address the important issue presented therein.

I. RESPONDENTS' BRIEF DEMONSTRATES CONSIDERABLE CONFUSION ABOUT THE PROPER STANDARDS TO APPLY TO QUESTIONS OF TRIBAL TAX AUTHORITY

Perhaps most telling in respondents' opposition brief is what it does not do: defend the court of appeals' decision on its own terms. The court of appeals adopted a multi-factor balancing test for determining whether an Indian tribe could tax nonmember conduct on fee land on the reservation. *See* Petition at 13 ("Pet."). Conspicuously absent from respondents' brief is any defense, or even mention, of this balancing test. As the petition pointed out, this test is both theoretically flawed and practically impossible to apply. The failure of respondents to defend the rationale of the decision below is a sign that certiorari is warranted.

Equally significant, respondents make almost no attempt to fit this case within the framework set forth in *Montana* and reaffirmed in *Strate* for dealing with assertions of tribal authority over nonmembers on fee land. Those cases recognized a relatively narrow exception permitting a tribe to "regulate ... through taxation ... the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. However, the district court here had already found, "No explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." App. 65a. Respondents never address this critical finding. They fail to show that the circumstances of the hotel guests fall within the *Montana* exception for consensual relationships.

Instead, respondents propose their own standard for tribal taxation, based on whether the hotel's guests tacitly accepted "the benefits of civilized society" and police protection and other unspecified governmental services from the tribe.

Respondents' Br. at 8, 11-13. In their view, the hotel's "guests have consented to the jurisdiction of the Navajo Nation by entering the Navajo Nation territory. . . ." *Id.* at 13. They stress that Atkinson's guests "travel across the Navajo Nation to Atkinson's business location, all within the territory of the Navajo Nation." *Id.* Of course, this "territory-based analysis" (*id.*) is precisely the theory that this Court rejected in *Strate* when it held that nonmembers do not become subject to tribal jurisdiction simply because they enter the reservation on a public highway. As a number of States point out in their *amicus* brief, respondents' expansive theory would "overrule *Strate* sub silentio." *See* Brief of Amicus Curiae States of South Dakota, Alabama, Colorado, Florida, Michigan, Mississippi, Montana, Utah and Wyoming in Support of Petitioner at 9 ("States' Br.").[1]

Respondents' standard completely divorces the issue of tribal authority over nonmembers from the touchstone of that authority—the power to exclude nonmembers from tribal lands. *See* Pet. at 11-13. Under the amorphous standard proposed by respondents, the issue of the ownership of the land—made so central to the determination of tribal authority by *Montana* and *Strate*—would have *no role whatsoever* in the jurisdictional inquiry. *See* Respondents' Br. at 11 ("the fact that Atkinson Trading is a nonmember conducting business with mostly nonmembers on fee land has no bearing on the Navajo Nation's power to tax, so long as the activity to be taxed is within the governmental jurisdiction of the tribe").

Respondents seek support for their approach in *Merrion v. Jicarilla Apache Tribe*. In *Merrion*, however, the Jicarilla

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[1] In the related context of tribal criminal jurisdiction, this Court has expressly rejected an identical theory of "implied consent." In *Duro v. Reina*, 495 U.S. 676 (1990), the Court refused to adopt "the argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him." *Id.* at 695.

Apache tribe sought to tax nonmember oil and gas production on *tribally owned* lands. Unlike the Navajo Reservation, the Jicarilla Apache Reservation was composed *entirely* of tribal trust property. *Merrion*, 455 U.S. at 133. In addition, the taxpayer in *Merrion* had entered into a commercial mineral lease directly with the tribe. These factual distinctions explain the holding of that decision and the absence of any discussion of *Montana* in *Merrion*.

Nevertheless, respondents' citation of some broad language from *Merrion* demonstrates the confusion that is possible when the reasoning of *Merrion* is divorced from its particular factual context. For instance, respondents quote a passage from *Merrion* in which the Court described the power to tax as "an essential attribute of Indian sovereignty." Respondents' Br. at 12. That entire passage, however, was explaining the holding of *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). Key to the Court's discussion is the preceding sentence, omitted by respondents, which restates *Colville*'s holding that " '[t]he power to tax transactions *occurring on trust lands* and significantly involving a tribe or its members is a fundamental attribute of sovereignty . . . .' " *Merrion*, 455 U.S. at 137 (citation omitted) (emphasis added). Thus, the "inherent sovereignty" discussed by the *Merrion* Court is nothing more than the tribe's power to regulate conduct on its own lands or involving transactions with the tribe itself, a power consistent with the rule of *Montana*.

As *Strate* recognizes, *Montana* is the "pathmarking case" for all exercises of civil jurisdiction by a tribe over nonmember conduct occurring on non-Indian land. *See Strate*, 520 U.S. at 445. *Merrion*, on the other hand, established a much narrower rule that applies only to the exercise of tribal taxation authority over nonmembers on *tribal land*. This case thus presents this Court with the opportunity to clarify the roles of these two separate lines of

authority in determining the scope of tribal authority over nonmembers.

Similarly, respondents' continuing reliance on the Eighth Circuit's decision in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), confirms the need for this Court's guidance. *Buster* is a century-old case of dubious validity that exacerbates, rather than illuminates, the existing conflict on tribal taxation of nonmembers.

In the first place, much of the broad permissive language of *Buster* is inconsistent with this Court's more recent decisions in *Montana* and *Strate*. For instance, the Eighth Circuit asserted that "every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself." 135 F. at 950. That bedrock assumption of *Buster* cannot be reconciled with *Montana*'s observation that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." 450 U.S. at 563. In fact, this Court has emphasized "the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' . . . and is therefore *not* inherent." *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (citation omitted).

In any event, *Buster* involved unique circumstances. There, the tribal tax had been imposed on nonmembers for some time prior to the opening up of the Creek reservation to non-Indian settlers. Moreover, Congress had required presidential approval before any Creek ordinance became effective, 30 Stat. 495, 518 ¶ 33 (June 28, 1898); the President had signed the Creek ordinance, *see* 135 F. at 954, 956; and the Interior Department had promulgated a regulation authorizing Indian Agents to collect the permit tax, *id.* at 957. All of these actions occurred prior to the purchase of any fee land and provided a predicate for any conclusion

that traders could be required to pay a permit tax for the privilege of doing business on the reservation.

Respondents note that on various occasions this Court has sought to explain *Buster*. In the most recent decision, this Court viewed *Buster* as falling within *Montana*'s first exception for "consensual relationships." *Strate*, 520 U.S. at 457. This characterization, on its face, suggests that *Buster* would have no applicability to a case where the tax is imposed on hotel guests who have no consensual relationship with the tribe. Respondents' reliance on *Buster* again illustrates the need for clarification by this Court.[2]

This Court has never reached the important issue presented in the petition—the scope of tribal taxation authority over non-Indians on fee land. Petitioner believes that the resolution of this issue is governed by the straightforward analysis of *Montana* and *Strate*, but the Tenth Circuit and the Navajo Nation read some language in this Court's opinions more broadly to conclude otherwise. The petition should be granted to clarify the distinct roles played by *Montana* and *Merrion* in questions of tribal taxation.

II. RESPONDENTS' BRIEF HIGHLIGHTS THE CONFLICT AMONG THE CIRCUITS

Respondents devote a great deal of space in their brief to explaining and defending the Ninth Circuit's decision in *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899. *See* Respondents' Br. at 12-13, 16-17. Respondents suggest that *Blackfeet Tribe* provides critical support for the decision of the court of appeals in this case, in that it accepts respondents' vague notion of taxation based on potential

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[2] Indeed, at this point, the various statements by this Court concerning the significance of *Buster* may make it more difficult for the courts of appeals to achieve harmony—a further reason for Supreme Court review.

benefits. However, respondents' heavy reliance on *Blackfeet Tribe* only further demonstrates the need for granting of the petition, because the Ninth Circuit has since *expressly* disavowed that case. In *Big Horn County*, the Ninth Circuit held that "*Blackfeet Tribe* is no longer good law." 219 F.3d at 953. That opinion's "failure to apply *Montana*," the *Big Horn County* court held, "undermines its precedential value." *Id.* at 953.[3]

Thus, as the States and other *amici* confirm, the Ninth and Tenth Circuits are now in "irreconcilable conflict." States' Br. at 12. Respondents argue that *Big Horn County* is distinguishable from this case in that it involved a different kind of tax, but do not explain why that would be significant. What is clear is that the two circuits hold opposite views on the significance of *Merrion* for taxes imposed on non-members on fee land or its equivalent. The *Big Horn County* decision expressly rejected reliance on *Merrion* in that context, *id.* at 952, while the Tenth Circuit placed substantial reliance upon it. App. 11a-13a. Thus, in their underlying logic, these cases have created an unavoidable conflict.

That conflict is illustrated by a group of district court decisions that have applied *Big Horn County* to taxes nearly identical to the hotel tax at issue here. *See, e.g., Rose v. Adams*, No. CV-99-1260BLG-JDS (D. Mont. Aug. 7, 2000), *reprinted in* App. 125a-134a. Indeed, a Montana district court has recently invalidated a resort tax on the gross receipts of a trading post identical in nature to Cameron

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[3] Similarly, respondents cannot derive support from the Ninth Circuit's decision in *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000). *Red Wolf* did not involve a tax issue; thus, its discussion of *Merrion* was dictum at best. *Red Wolf* was superseded by *Big Horn County*, which directly addresses taxing authority. A petition for en banc rehearing of *Big Horn County*, based partly on *Red Wolf*, was denied without a single contrary vote.

Trading Post. *See* Brief Amicus Curiae of Pacific Legal Foundation *et al.* at 11-12 ("Pacific Legal Foundation Br.") (discussing *Thompson v. Adams*, No. 98-110 (D. Mont. Aug. 7, 2000)). In *Thompson*, the district court applied the principles of *Big Horn County* to invalidate a Crow tribal tax that clearly would have been upheld under the Tenth Circuit's permissive rule in this case. These cases, ignored by respondents in their brief, furnish proof positive that, regardless of the specific taxes involved in the two circuit decisions, their logic is in inexorable conflict.

The implications of that conflict are not addressed by respondents at all, but they are confirmed in the briefs of the *amici curiae*. Nine States located in six different circuits have explained that the uncertainty created by the Tenth Circuit will lead "to new rounds of vexing, divisive litigation." States' Br. at 8. A definitive decision by this Court would not only "aid in the avoidance of conflict, but it will allow the States to fashion their own policies to integrate state and tribal taxation authority in ways beneficial to both." *Id.* at 1. As the Pacific Legal Foundation points out, almost half of the people living on Indian reservations are non-Indians, and their fee land is already subject to state taxation. Pacific Legal Foundation Br. at 4, 9-10. The Tenth Circuit's decision is "particularly troubling" to captive taxpayers like interstate pipelines and railroads, who are "the most visible, and vulnerable" targets for tribal taxing ordinances. *See* Brief of *Amicus Curiae* Interstate Natural Gas Association of America at 2-3.

In fact, what is most troubling about tribal taxation of nonmembers is that the people and entities bearing the substantial burden of paying the taxes have no say in the process through which those taxes are imposed. Tribal

governments are closed to those lacking tribal membership.[4] Moreover, tribal governments are not subject to those constitutional constraints that prevent States from imposing uneven taxation on outsiders. *See* Pacific Legal Foundation Br. at 6. Thus, even before the Tenth Circuit's decision, tribal taxes imposed on nonmembers were increasing. *Id.* at 5-6. The decision below—if not reviewed—will undoubtedly magnify that problem.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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[4] Thus, cases invoking the "benefits of a civilized society" to permit state taxes (*see* Respondents' Br. at 11-12) are inapposite, since *all* citizens living within a State's borders have an equal right under the constitution to participate in state elections.

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No. 00-454

IN THE
Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, MEMBERS of the NAVAJO TAX COMMISSION; and STEVEN C. BEGAY, EXECUTIVE DIRECTOR of the NAVAJO TAX COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

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INTEREST OF *AMICUS CURIAE*

The Interstate Natural Gas Association of America ("INGAA") respectfully submits this brief in support of the petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit.[1]

INGAA is a non-profit national trade association comprised primarily of interstate natural gas pipeline companies regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act ("NGA").[2] Member companies operate approximately 200,000 miles of natural gas pipelines, together with related facilities, within the United States, and INGAA's members account for more than 90% of all natural gas transported and sold in interstate commerce within the United States.

There are approximately 55 million acres of Indian land located within the United States. As a consequence of the location of this land, a number of pipeline companies which belong to INGAA have portions of their pipelines, and certain related pipeline facilities, located within the exterior boundaries of Indian reservations. To cross lands held in trust by the United States for Indian tribes or individual Indians, the members of *amicus* INGAA are required to obtain rights-of-way granted by the United States, most often under the authority of the General Right-of-Way Act of 1948. 25 U.S.C. § 323 et seq.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* INGAA states that no counsel for any party to this dispute authored this brief, in whole or in part, and no entity other than *amicus curiae* INGAA and its member companies, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and copies of these consents have been filed with the Office of the Clerk of this Court.

[2] 15 U.S.C. § 717 et seq.

Tribal governments often assert that they have jurisdictional authority over the on-Reservation portion of these pipelines, without regard to whether the pipeline is located on non-Indian owned fee land, or on Indian trust land. One area of jurisdictional authority of particular interest to INGAA and its members is the asserted power of Indian tribes to levy and collect taxes related to those pipelines and pipeline facilities located within the exterior boundaries of Indian reservations. As captive taxpayers who are unable to easily relocate their natural gas pipelines, the level and extent of tribal taxation has an impact upon the economic well being of those pipelines subject to tribal taxing efforts. Thus, any decision which appears to expand the scope of a tribe's taxing authority, particularly one that allows a tribe to tax a non-Indian for business conducted on non-Indian owned fee land within a reservation, is of critical importance to INGAA.

Amicus INGAA has a substantial interest in supporting the petition for certiorari for a number of reasons. INGAA, as a national trade association, has a strong interest in ensuring that its member companies are subject to taxation only where the taxing entity possesses the proper jurisdictional authority and power to impose a tax. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court held that rights-of-way granted to non-Indian parties pursuant to the General Right-of-Way Act of 1948 vested in the right-of-way recipient interests which were the equivalent, for purposes of determining tribal jurisdiction over such interests, to fee title. *Amicus* INGAA believes, based on precedent from this Court, that Indian tribes lack, except in special limited circumstances, the jurisdictional authority to tax a non-Indian party in connection with business activity taking place on fee land and not significantly involving a tribe or its members. *Montana v. United States*, 450 U.S. 544 (1981).

The Tenth Circuit's holding that the Navajo Tribe could impose a tax on non-Indian guests staying at a hotel on non-

Indian land, and the jurisdictional inquiry which it conducted in reaching such a holding, failed to consider the important jurisdictional limitations which apply to tribal action involving fee lands, and is inconsistent with the precedent of this Court and with a recent Ninth Circuit Court of Appeals decision. *Big Horn Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). This decision of the Tenth Circuit is particularly troubling to pipeline companies, since they are often the most visible, and vulnerable target for tribal taxing ordinances.

Amicus INGAA is also interested in supporting the petition for certiorari in order to obtain clarity for its members, and indeed for all non-Indian parties who conduct business on fee property or its equivalent located within an Indian reservation, that the taxing jurisdiction of Indian tribes is synonymous with and not superior to the other jurisdictional powers of a tribe. The Ninth Circuit Court of Appeals, in *Big Horn*, carefully and correctly applied the precedent of this Court gathered from a number of cases which have focused on a tribe's jurisdictional authority over non-Indians, and reached the conclusion that an Indian tribe lacks jurisdiction to impose a property tax on the property interests of a utility located within a federally granted right-of-way across tribal and allotted lands. The decision of the Tenth Circuit is inconsistent with the Ninth Circuit's decision in *Big Horn*, and that inconsistency appears to be reflective of an incorrect jurisdictional analysis undertaken by the Tenth Circuit.

Amicus INGAA's members have pipelines located in both the Ninth and Tenth Circuits, as well as in circuits which have not yet considered, in light of this Court's opinion in *Strate*, the jurisdictional authority of an Indian tribe to tax a non-Indian party doing business on fee property or its equivalent within the boundaries of an Indian reservation. It is of great importance to INGAA's members that all federal courts properly apply the jurisdictional guidelines of this Court's

holdings in *Montana*, *Merrion v. Jicarilla Apache* Tribe, 455 U.S. 130 (1982), and *Strate* to insure consistency in the extent and nature of tribal jurisdiction to which each non-Indian party is properly subject.

SUMMARY OF ARGUMENT

The precedent of this Court firmly evidences that any governmental entity seeking to impose a tax must have jurisdiction over the entity or activity being taxed before the tax is valid and enforceable. The precedent of this Court over the last 20 years has also served to clarify, and set within more narrow and precise boundaries, the extent to which an Indian tribe may assert jurisdiction over a non-Indian party doing business upon on-reservation, non-Indian owned fee land, or its equivalent. The Tenth Circuit's decision employs a sliding scale balancing test for determining the scope of an Indian tribe's taxing authority over non-Indians (and/or their property or activity) who are engaged in activity on fee lands. This test is inconsistent with the guiding precedent of this Court. The Tenth Circuit's balancing test seemingly will allow tribes to tax non-Indian parties under an inquiry that gives little consideration to the principles that have been at the center of this Court's Indian jurisdiction cases, while at the same time considering, for purposes of jurisdiction, the asserted needs and/or uses to be made of tribal tax revenue as if a tribe could obtain or earn the jurisdictional authority for a tax by the appropriate utilization of the tax revenue received. The failure to adequately consider the threshold issue of whether a tribe has the requisite jurisdiction to tax in light of this Court's clear and overriding rules concerning the scope of tribal jurisdiction over non-Indians in factual settings like that considered by the Tenth Circuit warrants review by this Court.

ARGUMENT

I. THIS COURT SHOULD REVIEW THIS CASE BECAUSE THE TENTH CIRCUIT FAILED TO CONDUCT A PROPER INQUIRY INTO WHETHER THE NAVAJO NATION HAD JURISDICTION TO IMPOSE ITS TAX

A. The Power of Taxation Cannot Be Validly Exercised Over Persons or Property Located Outside The Jurisdiction of The Taxing Authority

INGAA recognizes that the right of a tribe to tax is an essential element of its sovereignty. This power provides a mechanism for funding essential governmental services while also serving as a tool for territorial management. *See Merrion v. Jicarilla Apache Tribe*, 455, U.S. 130, 137 (1982). However, this power, like all sovereign powers, is limited in scope, and extends only to those over whom the taxing sovereign can properly exercise jurisdiction.

The power of a sovereign to tax was considered nearly two centuries ago by this Court in *M'Culloch v. State of Maryland*, 17 U.S. (4 *Wheat*) 316, 429 (1819), wherein Chief Justice Marshall noted:

> It is obvious, that it (the power to tax) is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

Similar pronouncements have been repeated as this Court has faced issues relating to the taxing jurisdiction of various governmental entities. *See*, *Louisville & Jeffersonville Ferry Company v. Commonwealth of Kentucky*, 18 U.S. 385, 396,

23 S.Ct. 463, 467 (1903) ("While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government."

This point was well made in *St. Louis v. The Ferry Company*, 78 U.S. (11 Wall) 423, 430 (1870), wherein this Court stated:

> Where there is jurisdiction neither as to the person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to a valid legislative as a valid judicial action.

A review of three key decisions of this Court on the issue of tribal jurisdiction over non-Indians clearly shows that the Tenth Circuit decision allowing the imposition of the Navajo Nation's Hotel Occupancy Tax on non-Indian parties utilizing a hotel on non-Indian land within the Navajo Indian Reservation failed to properly consider the fundamental question of jurisdiction utilizing the principles which this Court has laid down. When properly considered, it is clear that while the power to tax is one of many sovereign powers, the power to tax can no more stand alone than can the power to zone or the power to assert civil adjudicatory jurisdiction. Here, precedent of this Court has established that the general jurisdiction of a tribe does not extend to non-Indian parties who are engaged in business activities on fee lands within a reservation, and thus the power to tax, which is co-extensive

with, but not superior to the other jurisdictional powers of a tribe, is also lacking.

B. The Powers of Tribal Self Government Do Not Include the Jurisdiction to Impose Taxes On Non-Indian Parties Who Are Engaged in Business Activities On Non-Indian Owned Fee Land

Both the nature and the extent of tribal sovereignty have been addressed numerous times in the last two decades by this Court and other courts. From those decisions, a number of principles have developed which lead to the conclusion that the Tenth Circuit's decision improperly deviates from this Court's precedent and should thus be reviewed by this Court. A review of three of these decisions well evidences the propriety of granting the petition for a writ of certiorari.

This Court, in 1981, issued the seminal case of *Montana v. United States*, 450 U.S. 544, which undertook an extensive review of tribal civil jurisdiction over non-Indians, with particular emphasis on tribal attempts to regulate the activity of non-Indians occurring on fee lands. In *Montana*, this Court determined that the Crow Tribe could not regulate hunting and fishing by nonmembers of the Tribe where the activity occurred on fee lands within the reservation. In reaching its decision, this Court concluded that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Continuing, this Court observed that since "regulation of hunting and fishing by nonmembers of a tribe on land no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty" did not authorize the Tribe's activity. 450 U.S. at 564, 565. Rather, this Court concluded that, in general, the "inherent sovereign powers of an Indian

tribe do not extend to nonmembers of the Tribe." 450 U.S. at 565. This same analytical framework, and this same conclusion regarding tribal jurisdiction should have been reached here had the Tenth Circuit undertaken the proper inquiry into the jurisdictional power of the Navajo tribe to tax the activities of non-Indians occurring on non-Indian fee land. The taxation of activity occurring on fee land also bears no clear relationship to tribal self government or internal tribal relations.

In *Montana*, this Court did recognize that tribes may, in certain instances, exercise tribal civil jurisdiction over non-Indians, even where Congress has not expressly authorized such exercise and no specific treaty otherwise guarantees such jurisdiction. These circumstances were narrowly described as follows:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. 450 at 565-566 (citations and footnote omitted).

There is here no consensual relationship of the qualifying kind. See *Petition of Atkinson Trading Company Inc.*, at pages 15 through 18. Similarly, the Tribe's desire to tax has no relation to the Tribe's political integrity, economic security, or health and welfare.

The second case of great relevance is *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion*, this Court upheld the Jicarilla Apache Tribe's right to enforce a severance tax against non-Indian oil companies on any "oil and natural gas severed, saved and removed from *Tribal* lands . . . ." 455 U.S. at 133 (emphasis added). In so doing, this Court determined that the taxing power of a tribe could extend to non-Indians, but only if the non-Indian party was "engaged in economic activities within that [the Tribe's] jurisdiction." 455 U.S. at 137. In *Merrion*, the oil company lessees were determined to be within the scope of the Tribe's jurisdiction based on their contractual relationship with the Tribe and their having conducted business on tribal lands. In this Court's words:

> . . . a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power. A tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the Tribe. 455 U.S. at 141, 142.

Thus, in the leading case on tribal taxing authority, it is clear that an initial finding of tribal jurisdiction over the non-Indian party must be made in order for the taxing authority of the Tribe to be exercised. Where the activity to be taxed involves activities occurring on fee land, then *Montana's* jurisdictional analysis applies, as does *Montana's* inherent

presumption against tribal jurisdiction.[3] Here, simply by using state highways and staying at a non-Indian owned hotel located on non-Indian owned fee land, the non-Indian guests did not undertake any actions which would bring them within the Tribe's jurisdiction.

The third decision of direct consequence to this petition is the unanimous opinion of this Court in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *Strate* again adopts the *Montana* analysis for considering the scope of tribal jurisdiction over non-Indians. In addressing the issue of the adjudicatory jurisdiction of tribes over non-Indians on non-Indian fee land or its equivalent, this Court amplified on the broad application of *Montana*, stating:

> Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non-Indians." As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "does not extend to the activities of nonmembers of the tribe." 520 U.S. at 453 (internal citations to *Montana v. United States* omitted).

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[3] In this regard, this Court's decision in *South Dakota v. Bourland*, 508 U.S. 679 (1993) is instructive, inasmuch as *Bourland* forcefully notes that "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' (citing *Montana*) 450 U.S. at 564, and is therefore *not* inherent." 508 U.S. at 695, n. 15 (emphasis in original).

Since the power to tax is a "legislative power" and part of a tribe's "civil authority," the specific reference in the above quote to these broad terms undercuts any suggestion that the general jurisdictional limitations inherent in *Montana* do not extend to the full panoply of a tribe's sovereign powers, including the power to tax. Quite clearly, a tribe's taxing authority is merely one of the legislative powers which comprises a tribe's civil authority, and therefore one of the powers limited by *Montana* and *Strate*.

Here, the sliding scale balancing test adopted by the Tenth Circuit to determine whether a tribe should be allowed to tax a non-Indian party simply begs the question of whether there exists tribal jurisdiction to support such a right in the first instance. To conclude that a tribe can impose a tax based, even in part, upon the benefits to be obtained from the revenue generated by the tax, brings into the jurisdictional inquiry matters which have no bearing on jurisdiction, and suggests that jurisdiction can be earned by the taxing entity provided that entity makes proper use of the tax revenues which it receives. Under the analytical framework set forth by this Court, it is clear that the Tenth Circuit's analysis was flawed and failed to examine the jurisdictional reach of the Tribe's taxing power in light of the clear limitations which this Court has provided.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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No. 00-454

In the

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ROBERTA BUGENIG, JAMES D. THOMPSON, JULIA R. THOMPSON, AND THE CUSTER BATTLEFIELD TRADING COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Indian tribe may tax a transaction occurring between two nonIndians on fee land within the reservation?

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INTEREST OF AMICI[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property. In recent years, the Foundation has become increasingly concerned over the scope of regulatory and taxing authority asserted by Indian tribes over nonIndian-owned fee property located within the exterior boundaries of Indian reservations.

In this regard, Foundation attorneys are representing Amici James D. and Julia R. Thompson and the Custer Battlefield Trading Company in *Thompson v. Adams*, Montana District Court No. 98-110, a case now pending before the Ninth Circuit Court of Appeals. In *Thompson*, the Montana Federal District Court held that the Crow Indian Tribe could not impose a 4% "resort tax" on all gross receipts on a nonIndian business located on nonIndian fee land within the exterior boundaries of the Crow Indian Reservation.

Foundation attorneys are also representing Amicus Mrs. Roberta Bugenig, in the case of *Bugenig v. Hoopa Valley Tribe*, No. 99-15654, 2000 U.S. App. LEXIS 24746 (9th Cir. Oct. 3, 2000), a case where the Ninth Circuit found that the Hoopa Valley Indian Tribe lacks regulatory jurisdiction over timber harvesting activity on Mrs. Bugenig's fee property.

---

[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation, Roberta Bugenig, James D. and Julia R. Thompson, and the Custer Battlefield Trading Company affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

The decision in the case that is subject to the pending petition for writ of certiorari, *Atkinson Trading Company, Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000), implicates issues similar to those that the courts addressed in the *Thompson* and *Bugenig* cases. For that reason, these Amici have an interest in seeing that the Court addresses the reasoning in *Atkinson* in order to ensure uniformity of decisionmaking in the circuit courts of appeals.

Pursuant to Supreme Court Rule 37.2(a), written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The issue of when an Indian tribe may extend its regulatory and taxing jurisdiction over nonIndian-owned fee property continues to vex the lower courts despite numerous opinions from this Court. The decision below is the most recent manifestation of the difficulties that the courts have had in setting limits upon tribal jurisdiction over nonIndian-owned fee land. Despite this Court's admonitions in cases from *Montana v. United States*, 450 U.S. 544 (1981), to *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the lower courts have sometimes strayed, most notably in the decision below when the Tenth Circuit extended taxing authority over nonIndian-owned fee simple property. While the circuit below upheld a tax upon transactions taking place on nonIndian owned fee property, the Ninth Circuit and its district courts have rejected similar assertions of taxing authority. Similarly, the reasoning of the Ninth Circuit on other matters of regulatory jurisdiction show how different circuits are approaching these cases in ways that suggest further guidance from this Court is appropriate.

I

THE EXTENT OF NONINDIAN PRESENCE AND LAND ON INDIAN RESERVATIONS GIVES GREAT PRACTICAL IMPORT TO THE QUESTION PRESENTED

The seemingly narrow circumstances of this case—taxing nonIndian travelers on a state highway for lodging the night on nonIndian fee simple property—may mask the practical import of the doctrinal question presented. In fact, the potential quantum of inappropriate tribal regulation and taxation of nonIndians on nonIndian land is very great. The presumptive rule against tribal authority over nonIndian fee simple land is a quantitatively and historically important limitation on such unfairness. Accordingly, the Amici wish to "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties," Rule 37.1, specifically the extent of nonIndian population and fee simple land and equivalent land on Indian reservations and the increasing focus of tribal taxes on nonIndians.

As last revised by the Bureau of Indian Affairs Geographic Data Service Center in 1998, there are approximately 1,135,874,716 acres of Indian trust land in the United States located on 314 reservations. BIA Geographic Data Service Center, *Judicially Established Indian Land Areas 1978* (1998). They range from extensive tracts larger than some states to parcels of only a few acres. They are found in rural, suburban, and even urban areas.

As of the 1990 census there were 1,878,285 American Indians. Edna L. Paisano, U.S. Census Bureau, *The American Indian, Eskimo, and Aleut Population* 1 (2000) (last modified Jan. 29, 1999) <http://www.census.gov/population/www/pop-profile/amerind.html>. In 1999, that population was estimated at 2.4 million. *Population Growth Rate Remains Stable, Census Bureau Reports*, United States Department of

Commerce News, June 4, 1999, at 1, <http://www.census.gov/Press-Release/www/1999/cb99-101.html>. Only 22.3% of American Indians live on reservations. Bureau of the Census, U.S. Department of Commerce, *We the . . . First Americans* 7 (1993). Significantly, of the 808,070 people living on Indian reservations, 370,543, or 45.8%, are nonIndians. Bureau of the Census, U.S. Department of Commerce, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas* 3 (1990).

Data are not available from the Bureau of Indian Affairs or elsewhere on the precise amount of nonIndian fee land on Indian reservations. However, the Nineteenth Century policy of allotment, first by special statutes and then universally by the General Allotment Act of 1887, resulted in much land on many reservations passing into fee title and entering the stream of commerce. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 130-35 (1982 ed.).

Federally granted easements and rights-of-way on reservation land, often to nonIndians, have historically promoted development of Indian lands as well as the needs of Indians and nonIndians alike for transportation and other access. Such rights-of-way lead to the most casual and frequent presence of nonIndians on Indian reservations, the kind found in this case—travelers on state and federal highways who cross Indian lands merely in getting from one place to another.

The most permanent nonIndian presence and the strongest expectation of autonomy from tribal control and taxation on the reservation comes from owning land in fee simple or its equivalent. Federal grants of easements and rights-of-way are also the modern mechanism for giving secure titles equivalent to fee simple for major capital investments on the reservation.

The federal policy of inducing investment for the mutual benefit of Indians and nonIndians on easements and rights-of-way was codified in 1948 in 25 U.S.C. § 323, *et seq*. That

statute is a general authorization of such federal grants in lieu of the earlier practices of special laws and narrower statutes allowing such grants for more limited purposes or for specific reservations. Cohen, *supra*, at 543-44.

Thus, tribal regulation and taxation of nonIndians potentially affects hundreds of thousands of people living on reservations and innumerable other nonIndians.

II

TRIBAL TAXATION IS AIMED MOSTLY AT NONINDIANS

From the beginning of the Republic, it has been federal policy to protect the cultural and political autonomy of Indians who maintain their tribal relations. The most important tool of that policy has been the tribal power of self-government. Cohen, *supra*, at 660-63. It is in the nature of tribal self-government that only members of the tribe participate in that government. *See id.* at 662.

It is no surprise that in the resurgence of tribal taxation in the last two decades, tribes have sought largely to tax nonIndians, to whom tribal governments need not answer. A prominent commentator on Indian law has recently concluded:

> Some of the tribes have imposed taxes on business activity within Indian country, and those taxes have fallen largely upon non-Indian enterprises. . . .
>
> There has recently been a sharp increase in tribal taxes on non-Indian businesses, arising from a new awareness of the governmental powers of the tribes, along with heightened revenue needs. In some cases there is also a conviction that non-Indian enterprises have been granted leases or licenses that are unduly advantageous to them and

> disadvantageous to the tribes. Taxation is seen as one means of recouping the loss.

William C. Canby, Jr., *American Indian Law in a Nutshell* 261 (3d ed. 1998).

We know from the experience of parallel governments in our federal system that taxation of outsiders rather than insiders is primordial human behavior. In the interstate context, the Constitution itself consciously curbs that behavior through the Commerce Clause, the Privileges and Immunities Clauses, the Equal Protection Clause, and the Due Process Clauses. However, those constitutional limitations are usually found inapplicable to Indian tribes. *Talton v. Mayes*, 163 U.S. 376, 384 (1896). Therefore, in the absence of statutes, the federal common law of Indian relations must strike the right balance between tribal self-government, our democratic commitment to consent of the governed, and the civil rights interests of persons who are excluded by the immutable circumstances of their birth from a voice in a government that would take part of their freedom and property.

De facto and even de jure discrimination against nonmembers in tribal taxation is receiving the attention of lower courts. As shown in section III B below, the treatment by the lower courts has been inconsistent and requires the attention of this Court on broad doctrinal grounds. The first protection against such inappropriate taxation has been the recognition that nonIndian fee land is presumptively not subject to tribal regulatory jurisdiction or taxation. Whether that historic rule should be abandoned, as the Tenth Circuit now holds, or maintained, as the Ninth Circuit holds, merits the consideration of this Court.

III

THE DECISION OF THE TENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT AS WELL AS THE NINTH CIRCUIT COURT OF APPEALS

A. There Is a Presumption That NonIndian-Owned Fee Lands Are Subject to State and Local, Not Tribal, Regulatory and Taxation Jurisdiction; the Tenth Circuit's Ruling Is in Conflict with This Presumption

This Court has established a presumption that tribal governments do not have jurisdiction over fee property belonging to nonmembers. The origins of this presumption can be traced to the history, nature, and status of the fee simple property. However, the Tenth Circuit rejected the force of this Court's pronouncements on the nature of this presumption when it held that the status of the land as fee simple is not particularly important in determining the existence of tribal jurisdiction. *See* decision of Tenth Circuit, reproduced in Petitioner's Appendix (PA) at, e.g., 25a ("Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor of the Montana standard.").

It is undisputed that the fee land that is now owned by the Atkinson Trading Company is fee simple property. *See* PA at 2a. Within the boundaries of Indian reservations throughout the United States there are numerous similarly situated fee simple properties belonging to nonIndians, most of which first became private property as a result of the General Allotment Act of 1887, 24 Stat. 390 (current version at 25 U.S.C. § 331, *et seq.*). Significantly, there is a general presumption that such nonIndian-owned fee simple land created through the allotment acts is subject to state, not tribal, jurisdiction. For example, the General Allotment Act, after the passage of a trust period, provided that patent should issue and "then each and every

allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U.S.C. § 349.

The General Allotment Act, as well as other allotment acts, had a dramatic impact not only on tribal land ownership patterns but also on tribal versus state jurisdiction. With respect to all fee lands within Indian reservations, this Court has stated the "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *Montana*, 450 U.S. at 565. This Court has spelled out the limited nature of any remaining tribal jurisdiction over nonIndian land:

> Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, *United States v. Wheeler*, 435 U.S. 313, 326, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978), the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation," *Montana*, 450 U.S. at 564.

South Dakota v. Bourland, 508 U.S. 679, 694-95 (1993). *See also Montana*, 450 U.S. at 560 (citing to *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977), and noting that neither the acts of Congress, under which tribal trust lands were alienated, nor any treaty language establishing a reservation gave the Puyallup Tribe regulatory authority over land owned by nonIndians).

The effect of the allotment acts was to expand state regulatory jurisdiction over most fee land owned by nonIndians. Although Congress became disenchanted with and ultimately repealed the allotment acts, those repeals did not reverse the

jurisdictional changes affected by the allotment acts. For that reason, this Court has never held that Congress ever reversed the state's assumption of regulatory jurisdiction over fee lands owned by nonIndians.

In recent years, this Court has also made it clear that while the Allotment Act expanded the potential of state jurisdiction over privately owned fee property within Indian country, such expansion was limited. Thus the Court has found that states lacked "plenary power" over Indians residing on reservation fee lands. For example, in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), this Court found that the State of Montana could not impose its cigarette sales and personal property taxes and certain licensing fees on *Indian* residents of a reservation. It noted that the Allotment Act did not itself establish "Montana's jurisdiction as to those Indians living on 'fee patented' lands." 425 U.S. at 478. Earlier, in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 357-58 (1962), this Court found that it was unreasonable to suggest that section 6 of the Allotment Act removed patented fee land from the reservations and thus denied the tribes of criminal jurisdiction over *Indian* defendants residing on fee lands. To hold otherwise, this Court noted, would require law enforcement officers to research the land ownership patterns every time a criminal offense occurs within reservation boundaries. *Id.*

But just because this Court noted in cases like *Moe* and *Seymour* that the states do not have plenary jurisdiction over fee lands within Indian reservations, and just because the fee land remains within Indian country, that does not mean that the presumption against tribal regulatory jurisdiction over nonIndian fee lands articulated in *Montana* lacks force. In fact, in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), this Court was confronted with the question of whether the county could

impose certain real estate taxes on fee lands within the Yakima Reservation. The tribe argued, citing *Moe*, that the Allotment Act had essentially been repealed and that any state assertion of jurisdiction over fee lands was unlawful. This Court disagreed. It acknowledged initially that section 6 of the Allotment Act did not give "*in personam* jurisdiction . . . to include *subsequent* Indian owners." *Id.* at 262. But when looking at the entirety of the Allotment Act, this Court concluded that because "Yakima County's assertion of jurisdiction over reservation fee-patented land. . . . is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned; and it is not impracticable either." *Id.* at 264-65. This Court therefore found that the county could impose certain taxes over all fee lands—owned by Indians and nonIndians alike.[2]

The end result of the allotment acts was to diminish tribal jurisdiction over certain nonIndian-owned fee lands. As this Court has made clear, because the intent of the allotment acts was to do away with the reservation system, it was only natural that the nonIndian owners of the allotments were to be under state, rather than tribal, jurisdiction.

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 559 n.9; *quoted in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 423 (1989) (plurality opinion).

---

[2] Interestingly, all the parties to the case agreed that the state could tax fee lands owned by nonmembers of the Tribe. 502 U.S. at 265 (tribe and amicus) "would allow state taxation of only those fee lands owned . . . by nonmembers of the Tribe."

In contrast to this strong presumption against finding tribal jurisdiction over fee simple property belonging to nonIndians, the Tenth Circuit chose to minimize the import of the land's status. *See, e.g.*, PA at 16a-19a, 25a. This cannot be reconciled with the opinions of this Court. Granting the petition for writ of certiorari is the only way to resolve this conflict.

B. The Decision Below Cannot Be Reconciled with the Opinions of the Ninth Circuit

1. Cases Like *Big Horn County Electric Cooperative v. Adams* Are Better Reasoned Than *Atkinson*

Ever since *Montana*, and despite the lessons of *Montana*, the Crow Tribe has attempted to extend its regulatory and taxing jurisdiction over nonIndian-owned lands. The most recent Ninth Circuit opinion on this issue, *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), and the case of Amici James D. and Julia R. Thompson and the Custer Battlefield Trading Company in *Thompson v. Adams*, reflect this continuing difficulty.

In *Big Horn*, the Crow Tribe imposed an ad valorem tax on easements owned by an electric cooperative and the cooperative sued in federal district court. 219 F.3d at 948-49. Finding that the utility's easements were the functional equivalent of fee land, *id.* at 950, the court proceeded to find that the tribe had no taxing authority over the property. It rejected first the argument that there was a "consensual agreement" because the tax was imposed upon property, not actions arising out of consensual relationships. *Id.* at 951. The tribe also argued that tribal integrity would be threatened if it could not raise the revenues, which it needed to finance tribal services. The Ninth Circuit rejected this argument also, finding that it would swallow the rule of *Montana*. *Id.* at 951-52.

The Thompsons, who are not Indians, face a similar problem in their case, which is now pending before the Ninth

Circuit, Case No. 00-35805. They own a trading post on fee land upon which the tribe has imposed a 4% resort tax upon all gross receipts. In an order dated August 7, 2000, the Montana District Court struck down the tax because the tribe "does not have jurisdiction to tax transactions between non-Indians which occur entirely on non-Indian fee land." Order at 1-2. The emphasis upon the nature of the land ownership is an analysis that is more consistent with this Court's holdings than the holding of the Tenth Circuit in *Atkinson*.

Additionally, the district court in *Thompson* relied upon the reasoning in two other Montana Federal District Court challenges to the identical resort tax on the Crow Reservation, *in re Haines*, 245 B.R. 401 (D. Mont. 2000), *appeal pending sub nom. Crow Tribe v. Haines*, Ninth Circuit Case No. 00-35176, and *Rose v. Adams*, U.S. District Court Case No. 99-126, *appeal pending*.

If this Court were to resolve the outstanding issues in *Atkinson*, it would help clarify that the Ninth Circuit is on the right track with its decision in *Big Horn*. Furthermore, if this Court were to address the issues raised in *Atkinson*, then the Ninth Circuit would be able to better analyze the legality of the Crow resort tax at issue in *Thompson*, *Haines*, and *Rose*.

2. *Bugenig v. Hoopa Valley Tribe* Demonstrates a Proper Understanding of Tribal Jurisdiction

Amicus Mrs. Roberta Bugenig is a nonIndian whose ancestors migrated to the Hoopa Valley, California, area approximately 150 years ago. *Bugenig v. Hoopa Valley Tribe*, 2000 U.S. App. LEXIS 24746, at *4. In 1995, the tribe passed an ordinance establishing a buffer zone of one-half mile in every direction from the location of the White Deerskin Dance Trail. *Id.* Shortly after the establishment of the half-mile buffer zone around the dance trail site, Mrs. Bugenig purchased in fee simple 40 acres of land located within the reservation's external

boundaries and the buffer zone. *Id.* Mrs. Bugenig sought and obtained permission from the California Department of Forestry to remove second-growth trees from approximately three acres on her property in order to facilitate the building of a home. *Id.* at *5. After she began cutting trees, the tribe moved for an injunction in tribal court to prevent Mrs. Bugenig from harvesting her trees. *Id.* at *6.

After exhausting her tribal court remedies in a losing effort, Mrs. Bugenig sued in federal district court. The trial court ruled that based upon the Hoopa-Yurok Settlement Act, the tribe had jurisdiction over Mrs. Bugenig's fee simple property. *Id.* at *8.

The Ninth Circuit reversed. It found first that the terms of the Settlement Act did not reflect an intent of Congress to grant the tribe jurisdiction over fee property. *Id.* at *22. Secondly, it found on the basis of cases such as *Montana* and *Strate* that the relatively insignificant impacts of Mrs. Bugenig's activities on her land did not implicate the second *Montana* exception.[3] *Id.* at *23-*33. Tellingly, the court rejected the notion that an "aggregation" of impacts on fee simple property could justify tribal jurisdiction over fee property within a reservation. *Id.* at *29. In reaching this decision, the Ninth Circuit recognized the import of the nature of the underlying property:

> [A]n Indian tribe's claim of jurisdiction is significantly strengthened when the events at issue took place on land owned and controlled exclusively by tribal members. Conversely, when a tribe attempts to assert regulatory authority over land that is owned and controlled by a nonmember, it confronts a nearly impossible task.

Id. at *33.

---

[3] The second *Montana* exception is that the activity would have an adverse impact of the ability of the tribe to govern itself.

This decision in *Bugenig*, to the extent that it involves an interpretation of the Hoopa-Yurok Settlement Act, does not, of course, implicate any conflict with the case below. Likewise, the facts of *Bugenig* (regulating a minor timber harvest) are uniquely different from those in *Atkinson* (taxing trading post transactions) and one cannot say how the Tenth Circuit would have ruled in *Bugenig* simply based on its holding in *Atkinson*. Nevertheless, the differing understandings of these two circuits toward basic principles of Indian law and this Court's precedents regarding the importance of the fee simple status of property, point out a need for this Court to once again step in and provide needed guidance to the Tenth Circuit.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

DATED: October, 2000.

Respectfully submitted,

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No. 00-454

In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, MEMBERS of the NAVAJO TAX COMMISSION; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE STATES OF SOUTH DAKOTA, ALABAMA, COLORADO, FLORIDA, MICHIGAN, MISSISSIPPI, MONTANA, UTAH AND WYOMING IN SUPPORT OF PETITIONER

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INTRODUCTION

The States of South Dakota, Alabama, Colorado, Florida, Michigan, Mississippi, Montana, Utah and Wyoming through their respective Attorneys General, respectfully submit a brief Amicus Curiae pursuant to S. Ct. R. 37.2 in support of the Petition for Writ of Certiorari.

INTEREST OF AMICI CURIAE

Each State appearing as an amicus curiae contains one or more Indian reservations created under federal law. As a result of subsequent federal legislation, however, substantial amounts of reservation land are now owned in fee by nonmembers and by the federal, state, and local governments.

Each amicus State shares an interest in being able to predict, with some measure of certainty, the scope of tribal taxation authority. Not only will this knowledge aid in the avoidance of conflict, but it will allow the States to fashion their own policies to integrate state and tribal taxation authority in ways beneficial to both. *See, e.g.*, S.D. Codified Laws Ann. §§ 10-12A-1 et seq. (allowing agreements between state and tribes to collect tribal taxes); Mont. Code Ann § 18-11-103(1)(b) (1999) (authorizing public agency to enter into state-tribal agreements). Each State also faces the even more daunting task of determining the legal and appropriate extent of tribal jurisdiction generally with regard to non-Indians on reservations and the decision below undermines the finely tuned rules developed by this Court.

SUMMARY OF ARGUMENT

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Montana v. United States*, 450 U.S. 544 (1981), this Court established a bright-line rule with regard to the issue of whether a tribe could exercise civil regulatory authority over nonmembers on nontribal land within a reservation. The cases set out a "main rule" that absent contrary congressional direction, a tribe lacks civil authority over the conduct of nonmembers on land within a reservation to which the tribe has lost "gatekeeping" power. The Court has identified two exceptions to the main rule: A tribe may have civil regulatory jurisdiction over a nonmember on fee land who enters into consensual relationships with a tribe or its members or who engages in activity directly affecting the tribe's political integrity, economic security, health, or welfare. *Strate* and *Montana* thus establish a strong presumption *against* civil tribal authority with regard to nonmembers on non-Indian land within the reservation; the presumption can, however, be overcome by proof of one of the two exceptions.

The rule carefully drawn in *Strate* and *Montana* is radically undermined by the decision below. The court of appeals flatly rejected the thesis that the nontribal status of land was a critical lynchpin of *Montana* and *Strate*, characterizing such status as a mere "coincidence" Pet. App. 15a-16a or "simply one factor", *id.* at 16a, to be considered in determining the existence of inherent tribal authority. Moreover, in place of the carefully wrought test developed by this Court, the Tenth Circuit adopted a "balancing test" relating to the status and conduct of the nonmembers, the "nature" of the sovereign powers at issue and the impact of the nonmember conduct on the

tribe's power. The accounting of land status either falls within this test "or becomes secondary," according to the Tenth Circuit. *Id.* at 25a.

The decision below, moreover, aggravated its misinterpretation of *Montana* by adopting an extremely broad theory of implied consent to tribal jurisdiction. Under the Tenth Circuit's opinion, a nonmember impliedly consented to tribal civil jurisdiction merely by entering onto a reservation by way of a state highway for the purpose of spending a night at a non-Indian hotel on non-Indian land. *Id.* at 26a-30a. The Tenth Circuit further found that the tax in question could be applied because it was not "disproportionate" to the benefits received by the non-Indian. *Id.* at 30a-32a. In practical effect, the court of appeals' decision elevates the first, or consent, exception in *Montana* to controlling significance and, in practical effect, replaces the main rule's presumption against tribal authority with one in favor of such authority unless the particular regulation is deemed "disproportionate."

Certiorari review is thus essential to ensure that the doctrinal coherence of *Montana*'s "pathmarking" analysis is maintained. Absence of immediate review, we believe, will serve only to foment jurisdictional controversy over the full range of civil inherent authority in Indian country within the Tenth Circuit and beyond – conflict that can be avoided by disabusing the court below of its errant reconfiguration of *Montana*'s main rule and the consent exception.

ARGUMENT

I

THE COURT BELOW FAILED TO APPLY THE STANDARDS ESTABLISHED BY THIS COURT IN *STRATE* AND *MONTANA* REGARDING THE APPLICATION OF TRIBAL CIVIL JURISDICTION OVER NONMEMBERS FOUND ON NONTRIBAL LAND IN RESERVATIONS.

A. In *Montana v. United States*, 450 U.S. 544, 565 (1981), this Court determined that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Court identified two exceptions to that general rule. First, a tribe may retain inherent sovereign authority over non-Indians on reservations "even on non-Indian fee lands," and "may regulate, through taxation, licensing or other means, the activities of nonmembers who enter *consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* (emphasis supplied). In addition, the Court found that a tribe may retain inherent sovereign power "over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566; *see also South Dakota v. Bourland*, 508 U.S. 679, 695-696 (1993) (reaffirming *Montana* standards in the context of public lands on the reservation, and remanding for a decision on whether either of the "two exceptions" to that general principle applied).

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court dispelled all doubt as to the central position of the *Montana* test. *Strate* identifies *Montana* as the "pathmarking case concerning tribal civil authority over nonmembers." *Id.* at 445. Under *Strate*, the analysis in *Montana* sets out a "main rule," *id.* at 453, or a "general rule," *id.* at 446, providing that, absent contrary congressional direction, "Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare." *Id.* This Court continued on to emphasize the land-based nature of tribal jurisdiction: "Regarding activity on non-Indian fee land within a reservation, *Montana* delineated – in a main rule and exceptions – the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over nonmembers.' " *Id.* at 453.

One of the primary holdings in *Strate* – that a state highway right-of-way should be treated as nontribal land for the purpose of a *Montana* analysis – unambiguously reflected the central nature of the land-status inquiry with regard to the *Montana* analysis. *Id.* at 456 ("We therefore align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana*, accordingly, governs this case"). Because *Montana* was the "controlling decision," *Strate* held that to "prevail" the "petitioners must show that . . . tribal-court action against nonmembers qualifies under one of *Montana*'s two exceptions" (*id.*), a burden they failed to carry. *See El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (distinguishing *Strate* because it "dealt with claims

against nonmembers arising on state highways, and 'express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation' ").

B. That *Montana* set out a main rule – a presumption against tribal jurisdiction over nonmember activity on fee lands which can only be overcome by demonstrating the existence of one of two limited exceptions – warrants no further discussion. The court of appeals, however, effectively *rejects* the bright-line test of *Montana* and *Strate*, finding unpersuasive the contention that, under *Montana*, "fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation" (Pet. App. 11a) and opining that "[f]ee status is largely inconsequential in this case" (*id.* at 20a n.11). To the court below, "the status of the land involved as fee land or tribal land is simply one of the factors a court should consider when determining whether a tax on nonmember activity on the reservation falls within the civil jurisdiction of the tribe." *Id.* at 19a-20a. The court of appeals then departed from this Court's jurisprudence by adopting a refinement of the district court's "balancing test," *id.* at 14a, that focuses on two factors:

> (1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting to exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved. Any accounting of fee status either falls into the Court's study of these factors or becomes secondary.

Id. at 25a. The mischief wrought by this new "balancing test" is palpable.[1]

Aside from an abject failure to recognize and give effect to the plain holdings in *Montana* and *Strate*, the court of appeals has introduced into the sensitive area of tribal civil adjudicatory and regulatory authority a standard that makes infeasible a reasoned assessment of such authority's scope by States, tribes and individual nonmembers. Its "balancing test" thus subjects any determination with respect to the ability of a tribe to regulate nonmember activity to a highly subjective analysis by the federal courts. There can be no doubt that the injection of these novel principles into federal Indian law will lead, in

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[1] To the extent the court of appeals relied upon *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), that reliance was unjustified for the reasons discussed by Petitioner; i.e., both cases involved the application of tribal taxes to nonmembers who were doing business on tribal lands with either a tribe or a tribal outlet. Pet. 13-14. Neither factor is involved here. The court of appeals also devoted substantial attention to *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). *Buster*, while involving application of tax on trading within tribal territory against nonmembers who conducted business on their own lands, was decided against a unique statutory background and the conclusion that an 1896 law providing for the sale of townsites did not divest the tribe of its inherent authority with respect to taxing business activities – a tax which existed prior to the law's passage. *Montana* and *Strate*, which represent this Court's explication of inherent authority principles, establish that where, as here, tribal "gatekeeping" power has been lost by congressional or executive action, so too has tribal inherent authority, absent the presence of a *Montana* exception.

the Tenth Circuit (and beyond if this case finds application beyond that circuit), to new rounds of vexing, divisive litigation.

C. The court of appeals compounded its error by employing the "balancing test" to reconfigure the *Montana* consent exception. It accomplished this result by, one, adopting a sweeping theory of implied consent and, two, devising a "disproportionality" standard to determine whether the scope of this implied consent was exceeded. The practical result of this analytical regime is evisceration of the presumption against the existence of tribal inherent authority over nonmembers with respect to nontribal land activities.

1. The court of appeals held that a nonmember who enters a reservation using federal or state highways and stays at a nonmember-owned hotel located on nonmember fee land *impliedly* consents to tribal jurisdiction with respect to that transaction. The court predicated its holding on factual findings by the Navajo Tax Commission concerning "the extent of police, fire, emergency medical, and tourist services provided by the tribe to benefit [Petitioner] and its guests at the Trading Post." Pet. App. 27a. Since virtually all tribes will be positioned to argue that they contribute, either directly or indirectly, to "the privileges of living in an organized society" (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937)), the court of appeals' reasoning compels the conclusion that consent to tribal regulation of *any* kind must be implied merely by entering a reservation.

The court of appeals' analysis cannot be squared with *Montana* or *Strate*. In the former case, this Court reiterated

the parameters of the consensual relationship as covering the "activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. It is clear that the nonmembers in this case have not entered into commercial dealing, contracts, or leases with the "tribe or its members." The court below found in effect that the term "other arrangements" included the act of driving on a nontribal road to a nonmember hotel on nonmember land within the reservation. However, those acts are, as *Strate* observed in an entirely comparable context, " 'distinctly non-tribal in nature.' " 520 U.S. at 457. To credit the Tenth Circuit's theory is to overrule *Strate* sub silentio.[2]

2. The court of appeals, in its final embellishment of the *Montana* test, held that once consent had been established, a regulation in the form of a tax can be imposed, provided the regulation is "not disproportionate to the benefits" received. Pet. App. 32a. It premised this conclusion on the amount of the tax – 8 percent – which the district court had found within the range of similar taxes

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[2] Indeed, this Court rejected a previous attempt to use implied consent to establish tribal jurisdiction. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.2 (1978), the Court noted that there were signs at the entrances to the reservation advising that entry onto the reservation "would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court." Although the Court did not address the signs' significance in the opinion, it is plain that consent to tribal jurisdiction cannot be implied on the basis of conduct that, in itself, does not fall within the scope of the commercial or other contract-based activity referred to in *Montana*'s description of the first exception.

imposed by States or their political subdivisions – and the fact that the tax "is used in ways that appropriately benefit the taxpayers." *Id.* It is difficult to discern meaningful limits on a tribe's authority under this sort of reasoning, since it will be the very unusual tax or other regulation that cannot be said to benefit the nonmember in some fashion. The implied consent rationale thus could be used by a tribe to impose a speed limit on a nonmember using a state road through the reservation on the ground that tribal services in connection with such regulation "appropriately benefit" the drivers by reducing excessive motor vehicle speeds and increasing highway safety. In sum, the first "exception" swallows the "main rule" under the Tenth Circuit's approach which effectively replaces the presumption against tribal jurisdiction with a rule that presumes the existence of inherent authority absent a disproportionality finding.

II

THE DECISION BELOW HAS THE POTENTIAL TO SERIOUSLY DISRUPT APPLICATION OF *MONTANA* PRINCIPLES OUTSIDE THE TAXATION CONTEXT.

Although the litigation at issue involves a tribal tax, the principles at stake extend far beyond that issue. The logic of the court of appeals' decision, as indicated by the motor vehicle speed regulation hypothesized above, applies to *any* exercise of civil regulatory authority over nonmembers with respect to activities on their own property or other lands as to which a tribe has lost gatekeeping power. A salient, and actual, example of the disruption in Indian law promised by the decision below

emerges from the recently decided *Bugenig v. Hoopa Valley Tribe*, No. 99-15654, 2000 U.S. App. LEXIS 24746 (9th Cir. Oct. 3, 2000).

In *Bugenig*, the tribe attempted to impose a land use restriction on a small plot of nonmember-owned land. To determine whether the tribe could exercise jurisdiction, the court invoked the "general proposition" of *Montana* and the "two narrow exceptions." 2000 U.S. LEXIS 24746, at *23. As to the consent exception, the court noted that the tribal court below had concluded that the "first exception was inapplicable in light of the absence of any significant consensual relationship between Bugenig and the Tribe." *Id.* at *24 n.6. The court of appeals also found that the second exception had not been proven. Under the Tenth Circuit's decision, however, the result would have been the opposite. The nonmember would have been deemed to have consented impliedly to tribal authority merely by residing on the reservation. The question then would have become whether the land-use regulation was "disproportionate," and little doubt exists that the court below would have answered that question negatively since governmental entities engage in myriad types of such regulation and since the regulation by the Hoopa Valley Tribe was restricted to a prohibition against logging and not other uses of the property.

It bears emphasis that the effect of the decision below cannot be minimized because its anomalous rule would be applied only in the Tenth Circuit. That circuit has a large share of Indian country which has generated a significant amount of Indian law litigation both recently and over the years. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Hagen v. Utah*, 510

U.S. 399 (1994); *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Negonsott v. Samuels*, 507 U.S. 99 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

III

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DIRECT CONFLICT WITH THE NINTH CIRCUIT.

The Ninth Circuit decision in *Big Horn Electric Cooperative v. Adams*, 219 F.3d 944 (9th Cir. 2000), stands in irreconcilable conflict with the decision below, as the Petitioner argues. Pet. 18-25. Two points nonetheless merit brief iteration.

First, in *Big Horn* the court squarely rejected the notion that either *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) or *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) "abrogates *Montana*'s main rule." 219 F.3d at 952. The Ninth Circuit found instead that "*Merrion* actually lends support to *Montana*'s application in this case" insofar as *Merrion* indicates that a tax on non-Indian fee land would be an impermissible extension of tribal jurisdiction. *Id.* Likewise, the Ninth Circuit deemed *Colville* to be consistent with *Montana* in that *Colville* "dicta appears to support *Montana's* conclusion that tribal taxation power over property located on non-Indian fee land is extremely narrow." *Id.* Second, *Big Horn* straightforwardly followed the *Montana* test, initially concluding that the "main rule" applied because the tribe had lost gatekeeping power

over the rights-of-way and then determining that neither exception had been proved by the tribal authority proponents. *Id.* at 950-952. The Ninth Circuit's faithful adherence to this Court's *Montana* jurisprudence contrasts with the opinion below and creates a conflict among the circuits warranting certiorari review.

CONCLUSION

For the foregoing reasons the Amici States respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 11 2000
CLERK

No. 00-454

IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 22, 2000
CERTIORARI GRANTED NOVEMBER 27, 2000

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TENTH CIRCUIT COURT OF APPEALS

98-2247

ATKINSON TRADING COMPANY, INC.,
a New Mexico corporation,
Plaintiff-Appellant,

v.

JOE SHIRLEY, JR.; VICTOR JOE; DERRICK B. WATCHMAN;
ELROY DRAKE; MEMBERS OF THE NAVAJO TAX COMMISSION;
STEVEN C. BEGAY,
Director of the Navajo Tax Commission,
Defendants-Appellees.

DOCKET ENTRIES

DATE	PROCEEDINGS
9/23/98	[1165605] Civil case docketed. Preliminary record filed. DATE RECEIVED: 9/22/98. Transcript order form due 10/5/98 for Jennifer Bean pursuant to R.42.1. Docketing statement due 10/5/98 for Atkinson Trading. Notice of appearance due 10/5/98 for Steven C. Begay, Navajo Tax, Elroy Drake, Derrick B. Watchman, Victor Joe, Joe Shirley, Atkinson Trading. (nak)
9/23/98	[1165610] Notice received from Appellant Atkinson Trading that a transcript is not necessary for this appeal. Notice due that record is complete 9/28/98 for Bruce D. Black. (nak)
9/23/98	[1165618] Docketing statement filed by Atkinson Trading. Original and 4 copies. c/s: y. (nak)
9/23/98	[1165621] Statement of Issues filed by Appellant Atkinson Trading. Original and 3 copies. c/s: y. (nak)

DATE	PROCEEDINGS
9/23/98	[1165652] Notice received from Appellant Atkinson Trading that a transcript is not necessary for this appeal. Notice due that record is complete 9/28/98 for Bruce D. Black. (fg)
9/24/98	[1165993] Filed notice record is complete 9/22/98 Appellant's brief due 11/2/98 for Atkinson Trading. Appellant's appendix due 11/2/98 for Atkinson Trading. (fg)
9/25/98	[1166422] Case referred for mediation conferencing. (fg)
10/5/98	[1168925] Notice of appearance filed by William J. Darling, Margaret P. Armijo as attorney for Atkinson Trading. CERT. OF INTERESTED PARTIES (y/n): y (hrs)
10/26/98	[1173662] Order filed by PF - notice of appearance form due 11/5/98 for Joe Shirley, Victor Joe, Derrick B. Watchman, Elroy Drake, Navajo Tax, and for Steven C. Begay. Parties served by mail. (nak)
11/2/98	[1176268] Appellant's deficient brief filed by Atkinson Trading. Corrected appellant's brief due 11/13/98 for Atkinson Trading Apet Appendix due 11/13/98 for Atkinson Trading (hrs)
11/3/98	[1176488] Notice of appearance filed by Marcelino R. Gomez as attorney for Steven C. Begay, Navajo Tax, Elroy Drake, Derrick B. Watchman, Victor Joe, and Joe Shirley. CERT. OF INTERESTED PARTIES (y/n): y. (afw)
11/9/98	[1178413] Appellant's supplemental authority filed by Atkinson Trading. Original and 0 copies. c/s: y. (nak)

DATE	PROCEEDINGS
11/9/98	[1178682] Appellant's brief filed by Atkinson Trading. Original and 7 copies. c/s: y. Served on 11/6/98. Oral argument? y., Appendix filed. Original and 1 appendix copy. Appendix Pages: 1030. Appellee's brief due 12/9/98 for Joe Shirley, for Victor Joe, for Derrick B. Watchman, for Elroy Drake, for Navajo Tax, for Steven C. Begay. (fg)
11/9/98	[1243360] Oversized record filed. Record can be located at Section: Y Shelf: 2 (ds)
12/7/98	[1186283] Appellee's brief filed by Steven C. Begay, Navajo Tax, Elroy Drake, Derrick B. Watchman, Victor Joe, Joe Shirley. Original and 7 copies. c/s: y. Served on 12/2/98 Oral Argument? y Appellant's optional reply brief due 12/21/98 for Atkinson Trading. (hrs)
12/21/98	[1189961] Appellant's reply brief filed by Atkinson Trading. Original and 7 copies. c/s: y (afw)
2/10/99	[1202599] Hearing set for May 1999 Session, at Denver, Colorado. (sls)
3/24/99	[1215032] Appellant's motion filed by Appellant Atkinson Trading to reschedule oral argument [98-2247] . Original and 3 copies. c/s: y. (fg)
3/25/99	[1215290] Appellant's motion to reschedule oral argument submitted to panel. (ss)
4/9/99	[1220791] Order filed by PF denying Appellant's motion to reschedule oral argument [1215032-1]. Parties served by mail. (sls)
5/12/99	[1231994] Case argued and submitted to Judges Ebel, McKay, Briscoe. (sls)

DATE	PROCEEDINGS
5/25/99	[1235796] Case mediation conferencing terminated. (afw)
2/8/00	[1300240] Appellant's supplemental authority filed by Atkinson Trading and submitted to court. Original and 3 copies. c/s: y. (kf)
5/2/00	[1321432] Terminated on the Merits after Oral Hearing; Judgment Affirmed; Written, Signed, Published. Ebel; McKay, authoring judge; Briscoe, dissenting. [98-2247] (kf)
5/16/00	[1325312] Petition for rehearing or rehearing in banc [98-2247] filed by Atkinson Trading. Original and 14 copies. c/s: y. (kf)
5/16/00	[1325314] Document [1325312-1] Petition for rehearing or rehearing in banc filed by Appellant Atkinson Trading submitted to panel. (kf)
5/23/00	[1327040] Order filed by Judges Ebel, McKay, Briscoe - Response to petition for rehearing en banc due 6/7/00 for Joe Shirley, Victor Joe, Derrick B. Watchman, Elroy Drake, Navajo Tax, Steven C. Begay. Parties served by mail. (nak)
6/7/00	[1330703] Response filed by Steven C. Begay, Navajo Tax, Elroy Drake, Derrick B. Watchman, Victor Joe, Joe Shirley, Atkinson Trading to court ordered response regarding petition for rehearing en banc. Original and 14 copies. c/s: y. (nak)
6/7/00	[1330706] Response filed by Steven C. Begay, Navajo Tax, Elroy Drake, Derrick B. Watchman, Victor Joe, Joe Shirley submitted to court. (nak)

DATE	PROCEEDINGS
6/26/00	[1335391] Order filed by Judges Seymour, McKay, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Lucero and Murphy denying Petition for rehearing in banc. Judge Briscoe to grant and called for a poll of the en banc court. Judges Tacha, Baldock, Brorby and Murphy also voted to grant rehearing en banc. As the active judges split 5 to 5 in response, the suggestion fails. [1325312-1] (nak)
7/5/00	[1337114] Mandate issued to district court. Mandate receipt due 8/4/00. (afw)
7/11/00	[1338780] Appellant's motion to stay mandate filed by Appellant Atkinson Trading is docketed as a motion to recall the mandate. [98-2247] Original and 3 copies. c/s: y (afw)
7/11/00	[1338783] Appellant's motion to recall the mandate submitted to court. (afw)
7/17/00	[1340431] Order filed by Judges Ebel, McKay, Briscoe denying Appellant's motion to recall the mandate [1338780-1]. Parties served by mail. (nak)
8/3/00	[1345079] Mandate receipt filed. (jal)
9/28/00	[1358845] Petition for writ of certiorari filed on 9/25/00 by Appellant Atkinson Trading. Supreme Court Number 00-454. (kf)
12/4/00	[1375667] Supreme Court order dated 11/27/00 granting certiorari filed. (gah)

U.S. DISTRICT COURT
for the District of New Mexico (Albuquerque)

97-CV-1261

ATKINSON TRADING COMPANY, INC.,
a New Mexico corporation,
Plaintiff-Appellant,

v.

JOE SHIRLEY, JR.; VICTOR JOE; DERRICK B. WATCHMAN;
ELROY DRAKE; MEMBERS OF THE NAVAJO TAX COMMISSION;
STEVEN C. BEGAY,
Director of the Navajo Tax Commission,
Defendants-Appellees.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
9/23/97	1	COMPLAINT for Declaratory Judgment (5 Summonses issued) (referred to Magistrate Lorenzo F. Garcia) (ec)
9/23/97	—	FILING FEE PAID: on 9/23/97 in the amount of $150.00, receipt #: 107505. (ec)
10/14/97	2	ACCEPTANCE/ACKNOWLEDGEMENT OF SERVICE by Marcelino R. Gomez on behalf of the defts on 10/9/97 (kd) [Entry date 10/15/97]
10/24/97	3	MOTION by defts to extend time to answer pltf's complaint until 11/18/97 (kd)
10/27/97	4	ORDER by Magistrate Lorenzo F. Garcia granting deft's mtn to extend time to answer pltf's complaint until 11/18/97 [3-1] (cc: all counsel) (kd)

DATE	NO.	PROCEEDINGS
10/29/97	5	INITIAL SCHEDULING ORDER by Magistrate Lorenzo F. Garcia ; Rule 16 scheduling conference set for 1/5/98 at 3:00 pm; provisional discovery plan and IPTR due 12/29/97 (cc: all counsel) (jrm)
10/31/97	6	NOTICE by pltf of change of address for attys William J. Darling and Margaret P. Armijo (kd) [Entry date 11/03/97]
11/18/97	7	ANSWER by defendants w/affirmative defenses [1-1] (jrm)
12/29/97	8	PROVISIONAL DISCOVERY PLAN by parties herein (pr) [Entry date 12/30/97]
1/6/98	9	CLERK'S MINUTES: before Magistrate Lorenzo F. Garcia Rule 16 scheduling conference held on 1/5/98 (kd) [Entry date 01/07/98]
1/7/98	10	ORDER by Magistrate Lorenzo F. Garcia Assigning the case to an Administrative Track and Staying Discovery (cc: all counsel) (kd)
1/9/98	11	STIPULATION by the parties re: Official Navajo Tribal Court Records in the matter of: Atkinson Trading Co, Inc. No. SC-CV-54-95 (kd) [Entry date 01/12/98]
1/14/98	12	INITIAL PRE-TRIAL REPORT Judge Bruce D. Black and Magistrate Lorenzo F. Garcia; Estimated # of Trial Days: 1-2, Chances of Settlement: poor (cc: all counsel) (kd) [Entry date 01/15/98]

DATE	NO.	PROCEEDINGS
1/14/98	13	ORDER by Judge Bruce D. Black requesting the Supreme Court of the Navajo Nation to certify the record of the proceedings as described hereing (cc: all counsel) (kd) [Entry date 01/15/98]
2/11/98	14	INDEX of record on appeal filed by plaintiff pursuant to order [13-1] (dmw)
2/11/98	15	NOTICE by plaintiff of filing Certification and Index Listing of Appellate Case File (dmw)
2/11/98	16	CORRECTED INDEX of record on appeal filed by plaintiff pursuant to order [13-1] (dmw)
2/26/98	17	STIPULATED MOTION by plaintiff for order re use of record (dmw) [Entry date 02/27/98]
3/2/98	18	STIPULATION and ORDER by Judge Bruce D. Black: granting the joint mtn for order re use of record [17-1] see order for specifics (cc: all counsel) (kd) [Entry date 03/04/98]
3/30/98	19	MOTION by pltf for summary judgment against the defts (kd) [Entry date 03/31/98]
3/30/98	20	MEMORANDUM by pltf in support of mtn for summary judgment against the defts [19-1] (kd) [Entry date 03/31/98]
3/30/98	21	MOTION by pltf for trial de novo re: all matters at issue in this action (kd) [Entry date 03/31/98]

DATE	NO.	PROCEEDINGS
3/30/98	22	MEMORANDUM by pltf in support of mtn for trial de novo re: all matters at issue in this action [21-1] (kd) [Entry date 03/31/98]
3/30/98	23	MOTION by defts Navajo Tax Commission and Steven C Begay for summary judgment against pltf (kd) [Entry date 03/31/98]
3/30/98	24	MEMORANDUM by defts in support of mtn for summary judgment against pltf [23-1] (kd) [Entry date 03/31/98]
4/23/98	25	RESPONSE by pltf to defts' motion for summary judgment [23-1] (rd [Entry date 04/26/98]
5/11/98	26	REPLY by plaintiff to memorandum in opposition to trial de novo (opposition not in system) (sl)
5/11/98	27	REPLY by plaintiff to defts' response to motion for summary judgment against the defts [19-1] (sl)
5/11/98	28	MOTION by defts for summary judgment (rd) [Entry date 05/27/98]
5/11/98	29	MEMORANDUM by defts in support of motion for summary judgment [28-1] (pr) [Entry date 05/12/98]
5/11/98	30	RESPONSE by pltf to defts' motion for summary judgment [28-1] (pr) [Entry date 05/12/98]
5/11/98	31	REPLY MEMORANDUM by defts in support of motion for summary judgment [28-1] (pr) [Entry date 05/12/98]

5/11/98	32	MEMORANDUM by deft Navajo Tax in opposition to motion for summary judgment against the defts [19-1] (pr) [Entry date 05/12/98]
5/11/98	33	MEMORANDUM by deft Navajo Tax in opposition to motion for trial de novo re: all matters at issue in this action [21-1] (pr) [Entry date 05/12/98]
5/20/98	34	REQUEST by plaintiff for hearing on cross-mtn for summary judgment and mtn for trial de novo (jrm) [Entry date 05/21/98]
8/21/98	35	MEMORANDUM, OPINION, AND ORDER: by Judge Bruce D. Black granting defts' motion for summary judgment against pltf [21-1], denying pltf's motion for trial de novo re: all matters at issue this action [21-1] and denying pltf's motion for summary judgment against the defts [19-1] (cc: all counsel electronically) (rd) [Entry date 08/24/98]
8/21/98	36	ORDER by Judge Bruce D. Black re [23-1], re [21-1], re [19-1] and dismissing case (cc: all counsel electronically) (rd) [Entry date 08/24/98]
9/10/98	37	NOTICE OF APPEAL by plaintiff Atkinson Trading from Dist. Court decision [36-2], [35-1] ; Fees $105.00—Distribution as required. (cc: all counsel) (pg) [Entry date 09/16/98]

[Filed Feb 1 1996 SUPREME COURT NAVAJO NATION]

IN THE SUPREME COURT OF THE NAVAJO NATION
WINDOW ROCK, ARIZONA

Case No. SC-CV-54-95

IN THE MATTER OF:

ATKINSON TRADING CO., Inc.,
Appellant,

v.

OFFICE OF EXECUTIVE DIRECTOR
NAVAJO TAX COMMISSION
Appellee.

CORRECTED INDEX OF RECORD ON APPEAL AND RECORD ON APPEAL

TO THE NAVAJO SUPREME COURT CLERK:

Transmitted herewith is the *Corrected Index of Record on Appeal* in the above-captioned matter, together with four documents identified as Tabs 27-31 which should be included in the record on appeal.

Sincerely,

/s/ Henry L. Adams,
HENRY L. ADAMS, HEARING OFFICER
Office of Hearing and Appeals
Post Office Box 1300
Window Rock, Arizona 86515-1300
(520) 871-7836/7837/7838

[Filed Feb. 11, 1998 UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO]

[Filed Feb 1, 1996 SUPREME COURT NAVAJO NATION]

IN THE SUPREME COURT OF THE NAVAJO NATION
WINDOW ROCK, ARIZONA

[CV–97-1261 BB/LFG]

Case No. SC-CV-54-95

IN THE MATTER OF :

ATKINSON TRADING CO., Inc.,
Appellant,

v.

OFFICE OF EXECUTIVE DIRECTOR
NAVAJO TAX COMMISSION
Appellee.

CORRECTED INDEX OF RECORD ON APPEAL AND RECORD ON APPEAL

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CERTIFICATE OF SERVICE

Mailed a copy of the foregoing Corrected Index of Record on Appeal, by U.S. Mail, postage prepaid this 31 day of January, 1996 to:

William J. Darling, Esq.
Katherine M. Peck, Esq.
Attorneys for Taxpayer
Post Office Box 3337
Albuquerque, New Mexico 87190-3337

Marcelino R. Gomez, Esq.
Assistant Attorney General
Tax Unit
Navajo Nation Department of Justice
Window Rock, Arizona 86515

cc. Steve C. Begay, Executive Director
Amy L. Alderman, Esq.
Office of the Navajo Tax Commission

/s/ Ella Owens
ELLA OWENS
Legal Secretary

CJY-27-92

Class "C" Resolution

No BIA Action Required.

RESOLUTION OF THE
NAVAJO NATION COUNCIL

Enactment of the Hotel Occupancy Tax

WHEREAS:

1. The Navajo Nation Council is the governing body of the Navajo Nation, 2 N.T.C., Section 102 (a); and

2. Pursuant to 2 N.T.C., Section 724 (f) (2) , the Economic Development Committee of the Navajo Nation Council, in consultation with the Navajo Tax Commission, is authorized to make recommendations to the Navajo Nation Council regarding all taxation proposals affecting business or commercial activities; and

3. The Navajo Tax Commission is delegated the power, pursuant to 2 N.T.C., Section 3353 (a) (1), to review and study all sources of wealth and income within the Navajo Nation and possible revenues from the taxation of those sources, in order to develop an appropriate comprehensive system of taxation; and

4. The Navajo Tax Commission had reviewed existing tax revenue sources and has determined that the primary industry taxed is the natural resource extractive industry. The Navajo Tax Commission has also determined that the natural resource tax base is declining and is expected to continue to gradually decline in the future; and

5. In conformity with its establishing legislation, the Navajo Tax Commission has therefore determined that to develop and maintain a comprehensive system of taxation, the Navajo tax base must now be expanded; and

6. The Navajo Tax Commission has determined that the Navajo tax base will be expanded from the taxation of lodging or room rentals on the Navajo Nation; and

7. The Navajo Tax Commission has therefore developed the Hotel Occupancy Tax, codified as Title 24, Navajo Tribal Code, Section 700 *et seq.*, Hotel Occupancy Tax, and it proposes that it be enacted into law by the Navajo Nation Council, as attached in Exhibit "C"; and

8. The Hotel Occupancy Tax will produce significant increases in tax revenue; and

9. The initial impact of expanding the Navajo tax base will be greater stability of the tax base and greater self-reliance through additional revenues made available for governmental services and projects, with minimal impacts to the bearer of the taxes—Navajo businesses, Navajo enterprises and Navajo residents; and

10. By resolution TAX-92-087 dated March 20, 1992 (Exhibit "A"), the Navajo Tax Commission recommended to the Economic Development Committee of the Navajo Nation Council the approval of the Amendments to the Business Activity Tax (Exhibit "B") and Enactment of the Hotel Occupancy Tax (Exhibit "C"); and

11. On June 8, 1992, the Navajo Tax Commission held a joint meeting with the Economic Development Committee of the Navajo Nation Council to consider a proposed resolution recommending to the Navajo Nation Council the approval of the amendments to the Business Activity Tax and Enactment of the Hotel Occupancy Tax; and

12. After consideration, the Economic Development Committee of the Navajo Nation Council voted 6 in favor, 0 opposed and 0 abstained to table the proposed resolution; and

13. The Navajo Tax Commission has since held a public hearing on Friday, June 25, 1992, to receive public comments

on both the Business Activity Tax Amendments and the Hotel Occupancy Tax (Exhibit "E"); and

14. The Navajo Tax Commission, at a subsequent meeting, based on public comments and the actions of the Economic Development Committee of the Navajo Nation Council, determined to table the Business Activity Tax proposals for six months for futher study and to recommend approval of only the Hotel Occupancy Tax (Exhibit "C"), to the Economic Development Committee of the Navajo Nation Council; and

15. By resolution EDCJY-53-92 dated July 1, 1992, the Economic Development Committee of the Navajo Nation Council concurred in the decision of the Tax Commission to table amendments to the BAT (Exhibit "D") and approved the Enactment of the Hotel Occupancy Tax (Exhibit "C").

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Nation Council hereby approves, adopts and enacts the Hotel Occupancy Tax as 24 N.T.C., Section 700 *et seq.*, as set out in Exhibit "C" to this resolution.

2. The Navajo Nation Council further directs the Navajo Tax Commission to conduct further evaluation of the Navajo Tax structure, including the Navajo Business Activity Tax, and to report back to the Navajo Nation Council in six (6) months with recommendations.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 51 in favor, 6 opposed and 0 abstained, that 21st day of July 1992.

/s/ Nelson Gorman, Jr.
NELSON GORMAN, JR.
Speaker
Navajo Nation Council
July 28, 1992

ACTION BY THE EXECUTIVE BRANCH

1. Pursuant to 2 N.T.C., Section 1005 (c) (1), I hereby sign into law the foregoing legislation on this 30 day of July, 1992:

/s/ Peterson Zah
PETERSON ZAH, PRESIDENT
Navajo Nation

* * * *

2. Pursuant to 2 N.T.C. , Section 1005 (c) (10) , I hereby veto the foregoing legislation this ___ day of ___1992 for the reason(s) expressed in the attached letter to the Speaker:

_____
PETERSON ZAH, PRESIDENT
Navajo Nation

THE NAVAJO NATION
OFFICE OF HEARING AND APPEALS

Case No. 95-008

IN THE MATTER OF:

ATKINSON TRADING COMPANY, INC.

TRANSCRIPT OF PROCEEDINGS
July 24 & 25, 1995
Window Rock, Arizona

BEFORE: HENRY L. ADAMS
Hearing Officer

APPEARANCES

For Atkinson Trading Company, Inc.:
WILLIAM DARLING
Park Square Two, Suite 820
6565 Americas Parkway, NE
Albuquerque, New Mexico 87190

For the Navajo Tax Commission:
MARCELINO GOMEZ &
LURALENE TAPAHE
The Navajo Nation
Department of Justice
Office of the Attorney General
P.O. Drawer 2010
Window Rock, Arizona 86515

* * * *

[19]

EDWIN JOE ATKINSON

After having been first duly sworn under oath, was questioned and testified as follows:

[20]

DIRECT EXAMINATION

BY MR. DARLING:

Q Would you please state your full name.
A Edwin Joe Atkinson.
Q Are you known as Joe Atkinson?
A Yes.
Q Mr. Atkinson, what is your position with Atkinson Trading Company?
A I'm the president of the corporation.
Q How long have you been president of the corporation?
A Since 1972.
Q Where is Atkinson Trading Company incorporated?
A New Mexico.
Q Would you describe Atkinson Trading Company's facilities?
A We have a store in Gallup, New Mexico, and we have an operation in Cameron, Arizona.
Q What is the operation in Cameron, Arizona?
A It's a curio store, market, restaurant, cafeteria, gallery and motel.
Q Where is that facility located?
A Fifty-four miles north of Flagstaff, on Highway 89.
Q Who owns the property that Cameron Trading Post [21] is located on?
A Atkinson Trading Company, Inc.
Q How is that held, in what kind of ownership?
A It's fee.

Q Now, is there a direct—does your property—when I say "your property," I mean Atkinson Trading Company's property. Does it abut directly onto the public right-of-way of Highway 89?

A Yes.

Q Who established the trading post?

A Hubert Richardson.

Q When was that?

A I believe in 1916.

Q Now, have you traced back the title to the property?

A No, I haven't.

Q Well, do you know how the property originally came into private ownership?

A I believe it was a United States patent.

Q Describe the typical guest or customer at Atkinson Trading Company's facility in Cameron, Arizona, Cameron Trading Post.

A They're tourists.

Q Where do they typically come from?

A Grand Canyon. That's why they're in the area, [22] is to see the Grand Canyon.

Q Now, you mentioned Highway 89. Where does that come from?

A It comes from Flagstaff.

Q And in Flagstaff, what highway does that tie into?

A Interstate 40.

Q Now, where is Cameron Trading Post in relationship to Highway 64?

A It's one mile north of the junction of Highway 89 and Highway 64.

Q Where does Highway 64 lead?

A To the Grand Canyon.

Q Now, how far is it from Cameron Trading Post, along Highway 89, to the boundary of the Navajo reservation, going south?

A Eight miles.

Q Is there a community there?

A Yes.

Q What's the name of that community?

A Grey Mountain.

Q Now, going west along Highway 64, how far is it to the boundary of the Navajo reservation?

A I don't know.

Q Do you have any approximation?

[23] A No. I know that it's about 50 miles to the boundary of the Grand Canyon.

Q And the boundary of the Navajo Nation, is that somewhere between the junction of Highway 89 and the boundary of the Grand Canyon?

A Yes.

Q Where are Atkinson Trading Company's guests—where do they originate; what parts of the country, of the world?

A They come from all over the United States and Europe, Japan.

Q How do most of the guests and customers travel to Cameron Trading Post?

A The majority of them come by tour bus.

Q How do the rest of them come?

A Private car, rental car.

Q As far as you know, do most of them go anywhere else on the Navajo Nation other than stopping at Cameron Trading Post and then exiting the Navajo reservation?

A As far as I know, they're there to see the Grand Canyon, and they usually go into Las Vegas.

Q Now, to your knowledge, while Atkinson Trading Post's guests at Cameron Trading Post are on your property, do they transact any business with the Navajo Nation?

[24] A No.

Q Are there any facilities for them to transact business with the Navajo Nation?

A No.

Q Do they transact business with any Navajos who are not employed with Atkinson Trading Company?

A No.

Q Do you have any vendor areas set up where individual Navajos can sell their wares on your property?

A No.

Q What do your guests do while they're at your property?

A They shop in the store, eat in the dining room, stay over in the back of the rooms.

Q During that time, do they constitute any threat to the political integrity of the Tribe?

A No.

MR. GOMEZ: Objection. He's asking the witness to speculate. That's something that—he hasn't established any foundation.

HEARING OFFICER ADAMS: Please answer. Let's move on.

Q To your knowledge, while your guests are on your property, do they constitute any threat to the economic integrity of the Tribe—economic security of the Tribe?

[25] MR. GOMEZ: I'm going to object to that question, also, on the same basis.

HEARING OFFICER ADAMS: Your question is speculative, Mr. Darling.

MR. DARLING: Well, I said "to his knowledge." Let me lay some foundation.

HEARING OFFICER ADAMS: All right.

Q (By Mr. Darling) Mr. Atkinson, given the activities of your guests on your property, eating in the restaurant, shopping in the store, the gallery or staying overnight in the hotel, have you ever observed any conduct which would constitute a threat to the economic security of the Navajo Nation?

MR. GOMEZ: We would object on speculation, also. There hasn't been any clarification as to what the economic security of the Navajo Tribe is.

MR. DARLING: I think he can answer that. I could rephrase it.

Q (By Mr. Darling) Have you ever seen them have any effect on the economics of the Navajo Nation at all?

HEARING OFFICER ADAMS: You may answer.

A No.

Q Have you ever seen them have any effect on the health or welfare of the Navajo Nation while they were on your property?

[26] A No.

Q Now, at Cameron Trading Post, where do you get your electricity?

A Arizona Public Service.

Q And is that a Navajo-owned business; do you know?

A I think it's a private corporation. I don't know.

Q Where does Cameron Trading Post get its phone service?

A U.S. West.

Q Where does Cameron Trading Post get its gas service?

A Grave's Butane in Flagstaff.

Q What kind of gas do you use at Atkinson Trading Post?

A Propane.

Q And you buy that from a company in Flagstaff; is that correct?

A Yes.

Q Where does Cameron Trading Post get its water?

A From our wells.

Q I have several books with exhibits here.

MR. DARLING: I'd like to hand you one, and I'd like to hand the witness one, also.

[27] Q If you would turn to Exhibit No. 2. Can you tell me what that is?

A A Certificate of Water Right from the State of Arizona.

Q And is it pursuant to this water right that Atkinson Trading Company operates its wells?

A Yes.

Q What does Atkinson Trading Company do with its sewage at Cameron Trading Post?

A It goes through our sewer plant.

Q And is that a sewer plant that you operate and maintain yourself?

A Yes.

Q Would you describe the discharge from that sewer plant?

A It's potable.

Q What does "potable" mean, to your understanding?

A It's drinkable.

Q Where does that discharge go?

A It goes into the Little Colorado.

Q And does that meet all state and federal requirements?

A Yes, it does.

Q What does Atkinson Trading Company do with its garbage?

[28] A It's picked up by a garbage disposal company in Flagstaff.

Q How long have you been doing that?

A Four or five years.

Q To your knowledge—well, do any nonmembers of the Navajo Nation live on your property at Cameron?

A Yes.

Q Where do they get their medical treatment?

A At the PHS in Tuba City.

Q Now, I'm talking about nonmembers.

A Oh, nonmembers? I thought you said do any Navajos—

Q No, do any nonmembers live on your property?

A Yes.

Q Where do they get their medical treatment?

A In Flagstaff.

Q Where do their children go to school?

A There's a school—it's like an elementary school. I believe it's over by the Cameron Chapter. For the first few years, they go there and then they—or some of them still go to Flagstaff for those years. But some do go to that school for the first three years.

Q And then after those first few years, where do they go to school?

A Flagstaff.

[29] Q Now, the children that go to school in Cameron, who maintains that school, to your understanding?

A To my understanding, it's maintained by the State.

Q If your guests or customers have a health problem while they're at Cameron Trading Post, where do you refer them for medical treatment?

A To Flagstaff.

Q And why do you refer them to Flagstaff rather than to the Indian Health Service Facility through the City?

A The facility there is limited as to what they can do for nonmembers.

Q At Cameron Trading Post when there is an emergency and you do a 911 call, where does that ring?

A To my knowledge, it rings in Flagstaff.

Q Now, Highway 89 and Highway 64, who maintains those highways?

A ADOT.

Q And what is that?

A Arizona Department of Transportation.

Q Are those highways patrolled by the Arizona State Police?

A Yes, they are.

Q Are there any restrictions, as far as you know, [30] on anybody coming along those highways to come to your facility?

A No.

Q Does the Navajo Nation have any checkpoints or anything to restrict access along those roads?

A No.

Q What does Cameron Trading Post do with respect to fire protection?

A We have our own fire hydrants, fire hoses, and our own personnel.

Q Do you keep those facilities in good condition?

A Yes. We check all of the—we check the hydrant pressures and the hoses about twice a month to make sure.

Q Now, have you had any fires out at Cameron Trading Post since you have been involved with it?

A One that I'm aware of.

Q And what was the—who did you call when that fire happened?

A I don't know who they called. I was not on the premises.

Q What is the fire rating for your fire insurance at Cameron Trading Post?

A It's the highest rating they can give for non-protection. It's like a Class 10, I believe.

[31] Q So you're rated as if you had no protection. Is that what you're saying?

A That's correct.

Q Now, as far as you're aware, describe what police protection Cameron Trading Post has.

A Practically none.

Q Why do you say that?

A If we have a—I don't know of maybe one incident where there were non-Navajo people involved. If we called DPS, they responded quickly.

Q What is "DPS"?

A Department of Public Safety. That would be Arizona's equivalent to New Mexico's state police.

Q Okay.

A They responded well and quickly. About where most of—if they come out there and it's a member of the Navajo Tribe, then they can't—they don't have jurisdiction. That's what we're told, that they don't have jurisdiction. They will respond and be there until they can get someone from the Navajo Police to respond.

Q Now where is the nearest Arizona State Police facility?

A Grey Mountain, eight miles away.

Q What has been your experience in response to the Navajo Police?

[32] A Atkinson Trading Company's experience or my sole experience?

Q Yes, Atkinson Trading Company's experience.

A Oftentimes, they will not have an officer in the area and refer you to the county who, in turn, will refer you back to the Navajo Police because it's not a nonmember that's involved. Consequently, we have no response from this county sheriff or the Navajo Tribe.

Q Okay. Could—

A And then when they do respond, they take whatever—it depends on what has happened as to what they do after that.

Q Okay. Could you give some examples of what you mean by that?

A If it's a problem with an inebriated person, they will remove them from the premises. But they're usually back in a short period of time. If it's a problem with breaking into a vehicle or something like that, which you mentioned earlier, if it's that kind of problem, which we did have, and we did catch the people that were breaking in, they picked them up. We asked if we could file charges and we were told, no, it wouldn't do any good because they couldn't do anything about it—the police couldn't do anything. It wouldn't do us any good to file charges. They took the perpetrators home, and they were [33] back the next night.

Q Does Atkinson Trading Company have any consensual relationships with the Navajo Nation?

A No.

Q Has Atkinson Trading Company or has—let me ask it this way: As far as you know, have any individual Navajos ever asked to rent a room from Atkinson Trading Company at Cameron Trading Post?

A As far as I know? No. I'm sure they do. But if they did, they would be welcome to stay there.

Q Describe the nature of the sales that Cameron Trading Post makes to individual Navajos.

A They buy meals. They buy things from the store, arts and crafts, curios, T-shirts. They buy groceries, whatever they wish to buy.

Q What percent of your total business is that?

A One percent, maybe.

Q Now, do you charge Arizona sales tax of nonmembers who buy from you?

A Yes.

Q Do you charge Arizona sales tax from Navajo Nation members who buy from you?

A No.

Q Has Atkinson Trading Company, in the past, bought arts and crafts from individual Navajos at Cameron [34] Trading Post?

A Yes.

Q What percent of the total inventory that you got on sale did that constitute?

A Minuscule. A fraction of one percent—a tenth of one percent.

Q Why did you buy arts and crafts from the local people?

A Because they're our neighbors. We're doing it more to help them.

Q Do you still buy any of the arts and crafts from the local people at Cameron Trading Post?

A No, we do not.

Q Is Atkinson Trading—where do you get the Navajo arts and crafts and other Indian arts and crafts that you sell at Cameron Trading Post?

A From different vendors in New Mexico. It's mostly different vendors in New Mexico, some of them from Arizona.

Q Is Atkinson Trading Company an equal opportunity employer?

A Yes, we are.

Q Do you hire some Navajos to work at Cameron Trading Post?

A Yes, we do.

[35] Q Would you look at Exhibit No. 1 in that book?

A (Witness complies.)

Q By the way, while I think about that, I would like to move the admission of Exhibit No. 2.

MR. GOMEZ: I have no objection.

HEARING OFFICER ADAMS: It will be admitted.

(Note: Exhibit No. 2 admitted into evidence.)

Q (By Mr. Darling) What is Exhibit No. 1?

A Application for employment.

Q Is that the application for employment that's used at Cameron Trading Post?

A Yes, it is.

Q Does it have anywhere on there the person's—the applicant's race, ethnicity, national origin, gender, religion?

A No.

Q Do you use this application in your employment screening process?

A Yes.

MR. DARLING: I'd like to move the admission of Exhibit No. 1.

MR. GOMEZ: No objection.

HEARING OFFICER ADAMS: It will be [36] admitted.

(Note: Exhibit No. 1 admitted into evidence.)

Q (By Mr. Darling) What criteria does Atkinson Trading Company use in hiring its employees?

A The experience—I just went totally blank. The experience, ability, and that's from—I don't do the hiring personally, so I don't know any of the details. We do—in some instances, we don't require experience because we will do on-the-job training. But experience, willingness to work, attitude and ability.

Q Do you give any weight at all to race, national origin, gender, religion, any of those categories?

A No.

Q Do you feel that Atkinson Trading Company tries to hire the best qualified applicants without regard to those factors?

A Yes, I do.

Q Under the Equal Employment Opportunity Act, do you feel—is it your understanding that you could refuse to hire a qualified Navajo applicant?

A No.

Q How did you learn about the hotel occupancy tax?

A It was a written notice of some form.

Q After you learned of the hotel occupancy tax, [37] does Atkinson Trading Company file the tax forms and pay the taxes?

A Yes we have, under protest.

Q As a result of that, did you file a federal suit that then led up to this proceeding here?

A Yes.

* * * *

[39]

CROSS-EXAMINATION

BY MR. GOMEZ:

Q Would you please describe each of the business operations that you mentioned earlier that you operate on the fee land in Cameron?

A We have the motel; we have the restaurant; we have a cafeteria; we have a gallery; we have a retail store; we have a market and an RV park. I forgot to mention that before.

Q Were these the same operations at the Cameron Trading Post fee land when you took over the operations in 1977?

A Yes, with the exception of the gallery, and there—at the time we took over, they had a Laundromat, which we don't have any longer.

Q When did you eliminate the Laundromat?

A I don't recall. It's been a long time.

Q It was early on?

A Yes.

Q As far as the types of goods that are sold, you mentioned you have like a market. Is that like a food market or grocery store?

A Yes. It's more along the lines of a 7-Eleven, [40] Circle K.

Q Do you have like a meat market within that store?

A Yes, we do.

Q Do you have a butcher that works there, also, in the meat market?

A Yes, we do.

Q And I assume you sell some meats from the meat market; is that correct?

A Yes, we do.

Q Do you remember how many employees work in the grocery store?

A No, I don't.

Q Do you know who the current manager of the grocery store is?

A Yes, I do.

Q What's that person's name?

A Edward Humetewa.

Q Did you make grocery sales to members of the Navajo Tribe?

A Yes, we do.

Q Where do you acquire the goods that you sell in the grocery store?

A I'm not familiar with the particular vendors. That's not part of my position.

[41] Q Do you know where these vendors are located?

A I know that some come out of Flagstaff, some come out of Phoenix.

Q Do they usually deliver to your store?

A Yes.

Q But these delivery trucks travel across the Navajo Nation to make their deliveries to your grocery store?

A They do come up Highway 89, yes. On Highway 89—they would come up on Highway 89.

* * * *

[43] Q Do any members of the Navajo Tribe eat at your restaurant?

A Yes.

Q Do any members of the Navajo Tribe eat at your cafeteria?

A Yes.

Q Would you know where you acquired the food items that are served in your restaurant?

A I personally don't.

Q You mentioned you also operate an RV park. Do you know how many employees are assigned to the RV park?

A No, I do not.

Q Do you remember how many parking spaces you have in your RV park?

A I believe there's 35 or 40.

Q As far as facilities that you have in your RV park, what type of facilities do you have there for the RVs, the recreational vehicles that come in?

A Water, electricity and sewer.

Q Would you know how many vehicles stop in your RV park?

A No, I do not.

Q How many rooms do you have in your hotel?

A Sixty-six.

[44] Q Do you know what your average annual occupancy rate is in that motel?

A I would guess between 70 and 75 percent.

Q In your opinion, would all your guests travel across the Navajo reservation on Highways U.S. 89 or Arizona 64 to get to your motel?

A Yes.

Q Are the rooms in your motel pretty consistently equipped?

A Yes. We have four suites, which are an upgrade.

Q Would all of them have their own private bathroom?

A Yes.

Q You mentioned you have like a curio shop and a gallery. Are those the other two items, or the two types of stores you have on the property?

A Those are two that we have there.

Q What types of items do you sell in your gallery?

A The gallery is higher priced arts, Indian arts and crafts, antique bead work, baskets, textiles, along those lines, jewelry.

Q When you refer to textiles—what are you referring to when you say textiles?

A Those are Navajo rugs, Pueblo rugs, Rio Grande's and so on, Navajo wearing blankets and Pueblo wearing [45] blankets, and so on.

Q You mentioned jewelry. What are you referring to when you mention jewelry?

A That would be older pieces of Navajo, Hopi, Zuni jewelry items, bracelets, rings, necklaces, et cetera.

Q And you did mention that you used to purchase some of these arts and crafts from members of the Navajo Tribe at your Cameron store; is that correct?

A For the gallery or—not for the gallery—

Q For what? Was it for the gift shop that you purchased those items?

A That I purchased the items?

Q That you purchased arts and crafts from members of the Navajo Tribe at your Cameron store.

A Yes. For the gift shop.

Q But you indicated that you no longer do that; is that correct?

A That's correct.

Q Is that as a result of this litigation that you no longer do that?

A We were advised about two or three weeks ago to discontinue the practice.

* * * *

[46]

* * * *

Q Do you pay cash for the arts and crafts you purchased from members of the Navajo Tribe?

A Yes, we do.

Q Can you say that you paid cash for all of the arts and crafts purchased from members of the Navajo Tribe?

[47] A We would pay cash, and/or if it was their wish, if they wished to take trade, we would accommodate that.

* * * *

[48]

* * * *

Q (By Mr. Gomez) Let me rephrase the question. Did you ever make a loan to a member of the Navajo Tribe at your Cameron store or on the Navajo reservation since January 1st, 1993?

A I personally—I believe that we have probably loaned employees money.

Q So would the answer be yes?

A I would say yes.

Q Do you know if Atkinson Trading Company held a reservation business license for the Cameron Trading Post since January 1st, 1993?

A Yes.

Q Are you familiar with the Indian trader regulations for business practices on the Navajo, Hopi and Zuni reservations at 25 CFR 141 2d?

A The number you just read off, I wouldn't know exactly what that was, no.

Q I'd like you to take a look at this document. Have you ever seen that document before?

A Yes.

Q Could you describe what it is?

A It's a reservation business license.

Q Is this the reservation business license issued [49] to Atkinson Trading Company doing business as Cameron Trading Post?

A Yes.

Q And what are you licensed to sell under this license?

A Licensed to sell general merchandise, groceries, dry goods, feed, Indian arts and crafts, jewelry, curios, and operate a motel and restaurant.

Q Where at?

A At Cameron, Arizona.

Q What are the dates?

A From March 1st, 1994, to March 1st, 1999.

Q And then there is a paragraph after that. Can you read that paragraph, please?

A "In consideration of the granting of this license and by the acceptance thereof, the licensee expressly warrants that all applicable federal, state and tribal laws and regulations will be fully complied with in all respects and that authorized

annual license fees will be paid when due. Upon failure to do so, the licensee is subject to forfeiture of this license and such further action as the law and facts be justified. This license is revocable at any time pursuant to the provisions of Part 141 of Title 25 of the Code of Federal Regulations."

Q Are you aware—in processing this license, are [50] you aware of the, I don't want to mention red tape, but the steps that you would go through in getting this license processed?

A No, I'm not.

Q So would you be aware if there was an approval acquired from the Navajo Tribe to grant this license?

A No.

Q So if that was a requirement, you would not be aware of that, would you?

A No.

MR. GOMEZ: If you have no objection, we would like to introduce this as—I guess we would use a letter system for our exhibits?

* * * *

[51]

* * * *

(Note: Exhibit A admitted into evidence.)

Q (By Mr. Gomez) Do you remember how many employees you have at the Cameron location?

A Over—between 100 and 135, something like that.

Q Do you know how many of these are members of the Navajo Tribe?

A No, I don't know the actual number.

Q Do you have much of a turnover in your permanent employees?

A No, we do not.

Q Do you have some employees that have been with you for a long period of time since you have been operating the Cameron Trading Post?

A Yes.

Q Do you have any rough idea as to what that number would be?

A No.

Q How do you advertise vacant employment [52] positions?

A I don't know. That's not my position.

Q Do you have supervisors who report to you in the Cameron Trading Post?

A Yes.

Q Who would report to you from there?

A Mike Davis.

Q What position does Mike Davis hold currently?

A General manager.

Q Did you mention that Cameron Trading was opened by a person named Hubert Richardson; is that correct?

A Yes.

Q Do you know about what year that was?

A I believe it was 1916.

Q You also mentioned you had not done a title search; is that correct?

A I personally have not, no.

Q So would you know the exact date, then, when this land became fee land?

A No, I would not.

Q Would you know when the motel was opened at the Cameron Trading Post?

A No, I do not.

Q You indicated that you acquire electricity from Arizona Public Service Company?

[53] A Yes.

Q Would you know where Arizona Public Service Company produces their electricity?

* * * *

A No, I do not.

* * * *

[55]

* * * *

Q (By Mr. Gomez) You mentioned that you have your own water well, and there was an exhibit you referred to as Atkinson's Exhibit No. 2. Would you take a look at that, Mr. Atkinson?

A (Witness complies.)

Q This is a Certificate of Water Rights. Is that what you understand it to be?

A Yes.

Q And this allows you to pump up to 24 million gallons per annum for domestic?

A Yes.

Q Where do you pump this 24 million gallons, or up to that amount, from?

A Pardon?

Q Where are your water pumps located?

A They're down in the canyon beside the trading [56] post.

Q Beside the trading post?

A Yes.

Q Are they located in the river bed?

A It would maybe be on the south edge of the—it's down in the bottom of the canyon.

Q Do you know if those are located on your—on the boundaries of your property?

A Yes.

Q Have you surveyed that?

A Yes.

Q And this permit indicates you use up to 24 million gallons in a year. How many gallons of water do you use?

A We're using probably close to 22—21, 22 million right now.

Q And after you use this water, you mentioned you had a—is it a wastewater disposal plant or setup?

A It's a sewage treatment plant, yes.

Q And this is fed by the different businesses, including the motel; is that correct?

A Yes.

Q And you indicated that you discharged potable water into the Little Colorado?

A Yes.

[57] Q Do you currently have a permit to discharge that water?

A We have received notification that they were an issue, I guess. We don't currently have a discharge permit.

Q In Exhibit 2, a Certificate of Water Rights, have you ever—let me go back. Who have you received notification from that they're in the process?

A I'm not familiar with that—what they're called, someone out of San Francisco, I believe.

Q Was this a federal permit?

A I'm not familiar with that.

Q Would you know that if you were ever denied a permit by the State of Arizona to discharge?

A I wouldn't know if we ever were.

Q But you do know that you currently do not have a permit to discharge?

* * * *

Q Let's go to your garbage. This garbage—is this garbage that's generated from your store and the hotel?

[58] A Yes.

Q And your RV park?

A Yes.

Q You indicated that it's hauled off by a company out of Flagstaff?

A Yes.

Q For how many years has this company out of Flagstaff hauled off the garbage?

A Four or five years.

Q What was done with it prior to that time?

* * * *

A We took it to the local dump.

[59] Q The local dump. Would that be on the Navajo reservation?

A I believe so.

Q Are you aware that that local landfill was shut down a few years ago?

A Yes.

Q Was that about the time that you started using the company out of Flagstaff?

A Just prior, I believe. It was just prior to it being shut down.

Q You also indicated earlier that your kids in the area attend an elementary school that was operated by the State. Do you know how that elementary school was funded?

A No, I do not.

* * * *

Q (By Mr. Gomez) You also indicated that your 911 calls ring in Flagstaff. But you're not sure, are you?

[60] A That is to the best of my knowledge.

Q To the best of your knowledge. But you're not sure?

A No.

Q Would you be familiar with how many Arizona Highway Patrol individuals would be stationed in the Cameron area?

A No.

Q Would you be familiar with how many deputy sheriffs from Coconino County would be stationed in Cameron County?

A No.

Q You indicated here that a police officer, after taking into custody an individual who was breaking into vehicles on the Cameron Trading Post premises, when asked if you could

file charges said, "That wouldn't do any good." Were you present at that time?

A No, I was not.

Q Would you know the name of the Navajo Police officer who said that?

A No, I would not.

Q So you have no firsthand knowledge of that; is that correct?

A No, I do not.

Q You indicated that you buy most of your arts and [61] crafts from different vendors in New Mexico?

A Yes.

Q Where do you buy them?

A Gallup, Albuquerque, Santa Fe, Farmington, Shiprock. That's about most of them in that area.

Q You also indicated that you had filed your tax return under protest?

A Yes.

Q Is that correct?

A Yes.

Q Is this pursuant to a regulation that you filed your tax return under protest?

A I'm sorry, I don't understand.

* * * *

Q (By Mr. Gomez) Is it your understanding that the Navajo tax regulations allow a taxpayer to file a tax [62] return under protest?

A Yes.

Q Have you read the regulations?

A No.

Q You also mentioned here, in asking questions regarding the litigation with the U.S. Department of Interior, that you didn't think that the litigation was with the Navajo Nation?

A That's correct.

Q That it was—that the issue was whether you were required to obtain a trader's license?

A That's correct.

Q Was it your position in that previous litigation that your small amount of sales to members of the Navajo Tribe meant that you did not have to comply with the Indian Trader Statute?

A I just felt we shouldn't have to have an Indian trader's license for the business we were doing.

* * * *

[63]

* * * *

Q Was it your understanding that the position that you—in the Ashcroft litigation, is it your belief that you should not have to comply with the Indian Trader Statute regulations because you only made a small amount of sales to members of the Navajo Tribe?

A It was my understanding that I felt our position was that we didn't need to have an Indian trader's license because we didn't do—it was very insignificant. But we didn't need an Indian trader's license. That's what my position is.

Q The tourists that you have indicated that most of them are coming or going to the Grand Canyon, how would they know where you're located?

A The tour buses stop there. I mean, that's one way to find us. And then the only other thing we have is a few highway signs.

Q Do you have a sign at the junction of U.S. 89 and Arizona 64?

A Yes, we do.

Q On the Navajo reservation?

A Yes.

[64] Q Do you remember how long you have used that billboard to advertise on the Navajo reservation?

A Seventeen years.

Q Are you aware of any liquor being served and consumed at any time at the Cameron Trading Post or on the premises?

MR. DARLING: I would object to that question. I don't see that it's relevant to the hotel occupancy tax.

MR. GOMEZ: We feel it's relevant. Mr. Darling has taken the position that the activities occurring at the Cameron Trading Post are not a threat to the health and welfare of the Tribe. I think the serving of liquor on the Navajo reservation is a first-class threat to the health and welfare of the Navajo Tribe.

HEARING OFFICER ADAMS: You may answer.

MR. DARLING: Let me interpose another objection, I'm sorry.

HEARING OFFICER ADAMS: Sure.

MR. DARLING: One of the concerns that we have there, and the reason why I don't think that Mr. Atkinson should be required to answer that question, is because Mr. Gomez asked that question at one of the depositions of one of the witnesses. And based on that, there may be a question as to whether certain activities [65] at Cameron Trading Post in the past, which have been discontinued, may constitute a violation of federal law. And, therefore, based on U.S. Constitution, Mr. Atkinson cannot be required to answer that question.

HEARING OFFICER ADAMS: Well, as I understand your question, you're asking him if in the past have they served liquor at the Cameron Trading Post?

MR. GOMEZ: Yes.

HEARING OFFICER ADAMS: You may answer the question.

MR. DARLING: Well, I'm going to—again, I think under federal law he is not required to answer that question because of the fact that past practice may arguably constitute a violation of federal law, and I don't think he should be required to answer that question.

HEARING OFFICER ADAMS: Are you instructing Mr. Atkinson not to answer the question?

MR. DARLING: I think he has that right under the U.S. Constitution.

HEARING OFFICER ADAMS: Let's move on.

MR. DARLING: Mr. Atkinson, do you claim your right under the Federal constitution not to answer that question?

THE WITNESS: Yes, I do.

HEARING OFFICER ADAMS: Let's move on.

[66] MR. GOMEZ: May I ask what grounds that he claims that right?

MR. DARLING: Under the U.S. Constitution and Fifth Amendment.

MR. GOMEZ: Did Mr. Atkinson state that?

MR. DARLING: Is that a correct statement, Mr. Atkinson, of your refusal to answer that question?

THE WITNESS: Yes, it is.

Q (By Mr. Gomez) I'm just going to make sure I understand the reason why you're not answering the question. You're not answering this question in that you are claiming a right under the Fifth Amendment, and this is on the grounds of it might incriminate yourself or the company; is that correct?

A Yes, it is.

Q Thank you.

MR. DARLING: And let me make a statement for the record here with respect to anything that may have occurred in the past. We don't think there was any violation of any law, but to be on the safe side, we claim that right—Atkinson Trading Company claims that right.

HEARING OFFICER ADAMS: All right. Thank you. You mentioned a couple of responses to the Arizona sales tax. You mentioned that you did collect the sales tax on sales to nonmembers?

[67] A Yes.

Q But you did not collect sales tax on sales to tribal members?

A That's correct.

Q Why did you not collect sales tax on sales to tribal members—the Arizona sales tax?

A Because we were told that we shouldn't.

Q Do you know who told you?

A I believe it's in one of the regulations of the trader's license.

Q Would it be accurate to say that you do not collect the sales tax on sales to tribal members as the sale is to a member of the Tribe located on that tribal Indian reservation?

* * * *

A My understanding is that we're not to charge tax to tribal members because that's a requirement of a trader's license.

* * * *

[68]

REDIRECT EXAMINATION

BY MR. DARLING:

* * * *

Q With respect to any loans that Atkinson Trading Company has made to any of its employees, does Atkinson [69] Trading Company, or has Atkinson Trading Company ever charged interest on those loans?

A No.

Q Was that part of Atkinson Trading Company's business?

A No.

Q Why did you make loans to employees?

A They may have needed something or they had an emergency or whatever came up to assist them.

Q Did you ever do that anytime other than at the employee's request when they had a need of that sort?

A No.

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[70]

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MICHAEL DAVIS

After having been first duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. DARLING:

Q Please state your name, sir.

A Michael Calvin Davis.

Q Mr. Davis, where do you live?

[71] A Flagstaff, Arizona.

Q Are you an employee of Atkinson Trading Company?

A Yes, sir.

Q What is your position with Atkinson Trading Company?

A I'm the general manager of the Cameron operation.

Q Is that at Cameron Trading Post?

A Yes, sir.

Q How long have you held that position?

A It will be four years October 7th.

Q Are you responsible for the day-to-day operation of Cameron Trading Post?

A Yes, sir.

Q Now, describe the nature of the guests and customers that come to Cameron Trading Post.

A Well, it's a tourist business. A large majority of them come on tour buses or rental cars or their own personal vehicles.

Q While these guests are on Atkinson Trading Company property at Cameron Trading Post, what kind of activities do they engage in?

A Shopping in the gift shop and the market, eating in the dining room or cafeteria, and staying overnight in the motel.

[72] Q While they're on the property, have you ever observed any of them transacting business with the Navajo Nation or any member of the Navajo Nation?

A No, sir.

Q Are there ever any individual Navajos selling arts and crafts on Atkinson Trading Company property at Cameron?

A No, sir.

Q Now, with respect to the sewage treatment plant that Atkinson Trading Company has, there was a question as to the discharge from it. Could you explain the status of that?

A Yes, sir. We are currently operating under the old discharge permit. When it came up for renewal, there was a backlog. So at that point, ADEQ allowed us to operate under the old discharge permit until the new one was issued, which is supposedly within the next 30 days.

Q How do you attract customers and guests to stay at Cameron Trading Post?

A How do we attract customers there? Basically, it's the proximity of the Grand Canyon and the historic aspect of it.

Q Do you have a lot of repeat guests?

A Well, we have a small percentage of repeat guests. Most of the people—I mean, we have a large [73] percentage of Europeans that are coming through on tour buses, and since tour buses is the largest percent of our traffic, obviously a lot of it isn't repeat.

Q But do the same tour companies route their buses?

A Yes, sir.

Q In what other ways do you attract customers?

A Well, we have some advertising that we do with Southwest Art, American Indian Art, and billboards.

Q Do you also get word-of-mouth referrals?

A Yes, sir.

Q Does Atkinson Trading Company get—where does it get its electric power?

A APS.

Q Where does it get its phone service?

A U.S. West.

Q When you dial a 911 number, do you know where that rings?

A I'm pretty sure it rings in Flagstaff.

Q Where do you get your gas?

A Graves Butane out of Flagstaff.

Q Again, with respect to sewage treatment, where does the sewage treatment plant actually discharge?

A Its discharges on our property in the Little Colorado River.

[74] Q But the actual discharge point is on your property; is that correct?

A Yes, sir.

Q What kind of fire protection does Cameron Trading Post have?

A Basically none. We have our own fire hydrants, our fire hose that we use, we test periodically. Our maintenance crew is basically our fire department.

Q Have you had any fires since you have been there?

A One.

Q Who responded? What happened with that fire?

A Well, it was an employee housing unit located just to the south of the trading post. A fire truck came out of the Timberline Fire District in Flagstaff. We had already put the fire out prior to it getting out of hand.

Q Was there any response from either the BIA Fire Department or the Navajo Nation Fire Department?

A No.

Q Where do nonmember employees and nonmember guests, that's nonmembers of the Navajo Nation, where do

nonmember employees and nonmember guests get their medical treatment?

A Flagstaff.

Q Where do they get the emergency medical response [75] from?

A Well, I guess it would depend on how bad the emergency is. If it's an emergency, then we would call the Coconino County Sheriff's Department and they would dispatch somebody from Flagstaff.

Q Do you know who maintains Highway 89 and Highway 64?

A Arizona Department of Transportation.

Q Are those highways patrolled by the Arizona State Police?

A Yes, sir.

Q Where do nonmember employees send their children to school?

A At a young age, some of them go to the primary school there in Cameron. The majority of them go to Flagstaff. That's really the reason why I live in Flagstaff is because I have two school-age kids and I didn't want them riding the bus for two hours to school.

Q Is there a school bus that runs from Flagstaff to Cameron?

A Yes.

Q Now, the primary school in Cameron, do you know who maintains that school? Who operates that?

A The state, as far as I know.

* * * *

[81]

* * * *

Q In the market, what percent sales—well, not just the market but Cameron Trading Post, what percent of your sales are to members of the Navajo Nation?

A I don't know exact figures, but less than 1 percent.

[82]

* * * *

Q With respect to the Navajos that Atkinson Trading Company hires to work at Cameron Trading Post, what criteria do you use to determine whether to hire a particular individual or not?

A Work experience and willingness to work, basically.

[83] Q Is Atkinson Trading Company an equal opportunity employer?

A Yes, sir.

Q Do you use race, national origin, ethnicity, gender, religion as a factor or give it any sort of weight in deciding whether to hire an applicant?

A No, sir.

* * * *

CROSS-EXAMINATION

BY MR. GOMEZ.

Q You responded to some questions about the market and grocery store where you estimated about 1 percent or less of your sales are to members of the Navajo Tribe?

A Uh-huh.

Q What aspect of your business would have the highest sales to the members of the Navajo Tribe?

A As a percentage to the total department sales, it would probably be the market.

Q And these goods that you require for selling in the market, where would you acquire those?

A The majority of them come from a company called General Distributing out of Albuquerque.

Q And they deliver—do they deliver to the [84] market?

A Yes, sir.

Q Do you know if they deliver from their Albuquerque location?

A Yes.

Q So these delivery trucks would cross across the Navajo reservation to make their deliveries to the grocery store?

A Yes, sir, on U.S. 89.

Q On Interstate 40?

A Yes.

Q You also mentioned that about 70 percent of your meat processed by the butcher in the market went to your restaurant operations?

A Uh-huh.

Q Do any members of the Navajo Tribe eat at your restaurant operations?

A Yes, sir.

Q We were also looking at the motels. Do you remember how many rooms you have in that motel?

A Sixty-six.

Q Do you remember what your occupancy rate was in that motel?

A I would estimate around 70 percent.

Q To get to your motel, do people travel across [85] the Navajo reservation or Highway U.S. 89 or Arizona 64?

A Yes, sir.

Q You were asked some questions about your employees. How many employees do you have at the Cameron location?

A It varies from season to season, but right now we have around 120.

Q Is this the high season?

A Yes, sir.

Q During the low season, what would that drop down to?

A It would drop down to between 40 and 50.

Q Do you have much of a turnover in your permanent employees?

A No, sir.

Q Do you know how many of your permanent employees are members of the Navajo Tribe?

A I would estimate around 75 to 80 percent.

Q You mentioned that you were an equal opportunity employer?

A Yes, sir.

Q What is an equal opportunity employer?

A Well, we don't discriminate against anybody based on race, sex, nationality.

Q So those would be the criteria as to what you [86] understand to be the equal opportunity employer?

A Yes, sir.

Q You were talking about water disposal, and you used initials.

A Pardon me? I'm sorry.

Q On your water disposal, you mentioned ADEQ. What does that stand for?

A That's Arizona Department of Environmental Quality.

Q What is the current status of that discharge permit?

A The new one?

Q Yes.

A It's pending. I recently received a letter from the San Francisco Office with the Department of Interior.

Q Let me try to get this correct here. The discharge permit would come from the Arizona Department of Water Quality?

A Well, no, I guess—actually it's a federal issue permit.

Q Out of San Francisco, what department is handling it in San Francisco?

A Well, it's the Department of Interior Water Resources Management, I guess. I don't have the letter with me. I'm not sure exactly what the appropriate title [87] is.

Q The Department of Interior Water Resources Management. Would they be the people who would be issuing the permit, based on your understanding?

A Yes, sir.

Q Is there a tribal consent in that process?

A No.

Q Are you sure?

A Not that I'm aware of.

Q So you don't know; is that correct?

A To my understanding, no, there is no tribal consent required.

Q Did you receive a letter—did you ever apply for this water permit that we're currently talking about that's pending to the Arizona Department of Water Quality?

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[89]

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A No, I did not receive the letter from the Arizona Department of Environmental Quality. The Arizona Department of Environmental Quality knows that we have been operating under our old discharge permit. They have jurisdiction over us, but the letter came from the regional office in San Francisco that they would not be the Arizona Department of Environmental Quality.

Q Just one more question on this issue. Did you receive a letter from ADEQ telling you to go to either the Tribe or EPA for your permit?

A No.

Q Mr. Darling asked you if you ever observed tribal members selling, within the Cameron Trading Post premises, arts and crafts or any other things. Have you ever observed the members of the Navajo Tribe selling arts and crafts at any other point on the reservation?

A Yes.

Q For example, have you ever observed them sell arts and crafts near the junction of U.S. 89 and Arizona 64?

A Yes, sir.

Q You mentioned you advertised in a couple of magazines, Southwest Art, Indian Art, word of mouth. Do

you have a sign at the junction of U.S. 89, Arizona 64 on [90] Navajo trust land?

A Yes, sir.

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[91]

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Q You mentioned Highway 64 is patrolled by the Arizona State Police. Do you ever see any Navajo Police vehicles on that road?

A Sure.

[92]

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Q You mentioned you contacted the Navajo Tribe regarding some problems where you needed police protection in the Cameron area, and you talked with Officer Clarence Bilagody?

A Yes, sir.

Q When you said you contacted the Navajo Tribe, who did you contact?

A Just somebody in dispatch, and they dispatched Clarence.

Q And do you know Clarence?

A I've met him on occasion.

Q Have you ever seen Clarence drive by Cameron Trading Post?

A Not specifically that I can remember, except in instances where they responded to something that I've called them about.

Q Do you have an alarm at the Cameron Trading Post?

A Yes, sir.

Q Are you aware of Clarence ever responding to any of those alarm calls?

A Not Clarence specifically. It wouldn't surprise [93] me if he had.

* * * *

[94] Q But the Navajo Nation Police have responded to alarm calls in the past; is that correct?

A Yes, sir.

Q You mentioned that some Tribal members have stayed, during the Tuba City Fair, at your motel?

A Yes, sir.

Q And as far as where your employees reside—your Navajo employees, would it be your understanding it was on the Navajo reservation?

A I would have to say for the most part.

Q There was another question in here as to why people would come visit Cameron Trading Post, and I think you responded, one, because of its proximity to the Grand Canyon and the historic aspect of it?

A Uh-huh.

Q What do you mean by the "historic aspect of it"?

A Well, I guess in that it's one of the few remaining active old time trading posts.

Q Would it be your understanding that the Indian crafts that you sell might be a drawing card, also?

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[95]

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A I would say that's probably one aspect of the overall business.

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[96]

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LEONARD MORA

After having been first duly sworn under oath, was questioned and testified as follows:

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[99]

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Q Now, what experience—while you were the manager there, what experience did you have with response in connection with any fires? Were there any fires on the Cameron Trading Post property while you were there?

A Yes.

Q And what happened with that fire?

A They finally put it out before the—basically, we just kept the other building from burning before somebody responded.

Q Who responded to the fire?

A Somebody came out of Tuba City, and I don't remember which it was that came, one from Grand Canyon.

Q Now, the one that came from Tuba City, do you know if that was the Navajo Nation Fire Department or the BIA Fire Department?

A I don't remember.

Q When that fire happened, who did you call?

[100] A I called—if I remember correctly, I called the state police.

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[102]

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CROSS-EXAMINATION

BY MR. GOMEZ:

Q You were asked the question by Mr. Darling as to whether your guests posed a health or safety hazard to anybody and you responded—

A No.

Q In your deposition on Page 43, Line 19—Line 15, you were asked the question: "On your visitors who come to visit the Cameron Trading Post, do you monitor the activities of

your visitors while they are there?" And your answer: "What do you mean?" "Question: Did you like monitor what your visitors were doing while they were there at Cameron Trading Post?" Your response: "No."

Did you understand the question in your deposition, Mr. Mora?

A Let me get this clear. As far as like—maybe as far as whose definition of monitoring we're using, I mean, I did say that, as the manager here observing everything that's going on, but I don't police them. I [103] don't follow them unless they're causing problems, then I would monitor them. But if everything seems to be flowing properly, I don't follow them around.

Q Let me just show you the question, and then, if you can, read Line 19 at the "Q"?

A "Did you like monitor what your visitors were doing when they were there at the Cameron Trading Post?"

Q And your response was?

A "No."

Q Is that accurate?

A (No response.)

Q Is that accurate, Mr. Mora?

A Yes.

Q You also, with respect to your guests, you said that you think that they were not potentially harming the health and welfare of anybody. Have you ever seen any of your guests drink liquor at the Cameron Trading Post?

A Yes.

Q Were they served this liquor by Cameron Trading Post?

MR. DARLING: I'm going to object to that question on the same grounds that I did when Mr. Atkinson was asked that question.

HEARING OFFICER ADAMS: If you tend to—on the same grounds?

[104] MR. DARLING: Yes.

HEARING OFFICER ADAMS: I suggest you ask Mr. Mora to change the preface.

MR. DARLING: Yes. Mr. Mora, do you claim that privilege under the constitution to refuse to answer that question on behalf of Atkinson Trading Company?

A Yes.

* * * *

[105]

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Q As far as police protection at the Cameron Trading Post, is it true that you never remember any Arizona State Policeman arresting a member of the Navajo Tribe at the Cameron Trading Post?

A An Arizona State Policeman arresting one?

Q Yes.

A I remember them coming, but I don't remember them arresting anyone. I remember them coming to help us out.

Q I'd like to refer you to Page 42 of your deposition, Line 14. I asked you the question: "Were you aware of the state police ever arresting a Navajo on your premises?" What was your answer?

A "Not that I remember."

Q With respect to the fire, you indicated that you had it under control by the time a fire engine arrived from Tuba City; is that correct?

A Yes.

Q And with respect to your guests, were most of them on their way to or coming from the Grand Canyon?

A Yes.

Q Did you ever discuss the travel plans of your visitors with them?

A Through the course of years of being there, it [106] was just conversation of where they're going, what they're doing.

Q On Page 44 of your deposition, Line 3, I asked you the question: "Or did you ever discuss what the travel plans in the area were?" What was your response?

A "No."

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[109]

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FREDERICK WHITE

After having been first duly sworn under oath, was questioned and testified as follows:

[110]

DIRECT EXAMINATION

BY MR. DARLING:

Q Would you please state your name, sir.

A My name is Frederick H. White.

Q And Mr. White, are you employed by the Navajo Nation?

A Yes, I am.

Q What is your position with the Navajo Nation?

A Currently, I'm director of tourism for the Navajo Nation.

Q How long have you been director of tourism?

A Since October of 1991.

Q Does the Navajo Nation actively promote tourism?

A Yes, we do.

Q Why do you do that?

A The Navajo Nation is interested in promoting tourism to the Navajo Nation because the visitors that come to Navajo Nation bring tourism dollars. Basically, that means they spend their money here as they sightsee or recreate, visit sites, whatever.

Q Does that create jobs and revenues?

A The tourism that comes to Navajo Nation does create businesses that basically accommodate the visitors, and through that, I think they do create jobs.

Q And one of the purposes of the Navajo Nation [111] promoting tourism is to create jobs; is that right?

A Yes.

Q And also, you want to develop additional revenues for the Navajo people; is that correct?

A Yes.

Q Now, is the Navajo reservation open to the general public?

A Yes, it is.

Q Are there any restrictions on where nonmembers can go on the Navajo reservation?

A In specific areas like tribal parks, basically, visitors are not allowed in certain areas. Giving you an example would be Monument Valley. The people are restricted from accessing certain areas unless they obtain permits of some sort.

Q What is the purpose of that?

A The permit controls who goes back there to make sure that they have some sort of protection of the area. They might have special resources back there and they don't want, basically, people just to go in there by themselves. They would rather have a guide to go along with them.

And then in the case of back country, certain areas on the reservation are required to have Back Country Use Permits. And basically, that's everything off the main [112] highways. For instance, if people wanted to hike down to the Colorado River on the Navajo Nation side, they would need a Back Country Use Permit to do that.

Q Who issues those Back Country Use Permits?

A The Navajo Parks and Recreation Department.

Q Are there any other parts of the Navajo Nation that are restricted to nonmembers?

A To nonmembers?

Q Yes. Or restricted to people in general?

A To people in general? Basically, under those two categories, if it's a special park or if it's back country use, those are the only restrictions that I know of.

Q Now—I'm sorry, were you finished?

A Yes.

Q With respect to the Back Country Use Permits, are those required of both members and nonmembers?

A Yes.

Q And with respect to the permits to Monument Valley, are those required of both members and nonmembers?

A In Monument Valley or in Back Country Use Permits, there is a land user that has grazing rights, and they have customary land use of that area. Usually they are required to go into their own area, graze their sheep or check on their cattle.

[113] Q But other than—

A Other than that, nonresidents of that particular area are required to have permits.

Q And that's true whether they're a member of the Navajo Nation or not; is that correct?

A That's the way it is, yes, sir.

Q Now, other than Monument Valley, are there any other special parks?

A The Navajo Nation has 10 tribal park areas—parks and recreation areas, and there are also national parks and monuments within the Navajo Nation that have special requirements, and I think Special Use Permits are required.

Q Now, let's talk about the Navajo Nation of parks for a moment. Can you tell me which ones those are?

A Each one?

Q Well, as many as you can remember. I'm not trying to give you a pop quiz. I just want to get some examples.

A Okay. We have Lake Powell Tribal Park, Grand Canyon Tribal Park. We have Monument Valley Tribal Park,

Asaayi Tribal Park, Kinlichee Tribal Park, the Little Colorado River Gorge. Those are the only ones I can remember.

Q Now, you know, as I understand it when you go [114] into, say, the Grand Canyon National Park, you pay a fee and get a permit to go in there from the federal government; is that correct?

A Into Grand Canyon?

Q Yes.

A I'm not familiar with that.

Q Well, I guess what I'm trying to get at is the permits and the fees that you charge to go into the tribal parks; are those similar to the permits and fees that the federal government charges to access national parks?

A I would say they are, yes. They have the same purpose.

Q Is there any restriction on driving along the principal highways of the Navajo Nation?

A No. I don't know if there are. You mean, like anywhere on the reservation?

Q Right.

A No.

Q And, you know, in particular, are there any restrictions on driving on U.S. Highway 89 throughout the Navajo Nation?

A Not driving along the highway, no, other than health and safety laws.

Q Like speed limit?

A Yes.

[115] Q Okay. Now, is there any restriction on driving on Arizona Highway 64 from the Grand Canyon to the junction with Highway 89?

A I think along 89—I mean 64, there's some park regulations that might apply as far as vending is concerned.

Q As far as vending?

A Selling arts and crafts along the highway. And I think that might apply, as I remember, on Highway 89, too. I know

there was an effort, oh, several years ago, I don't remember exactly when, the state—it was the Department of Transportation and the Tribe and the Chapter tried to work out some policies regarding arts and crafts vending along the highways.

Q So would that apply to sales of arts and crafts by members of the Navajo Nation along the highway?

A That was just primarily having to do with their safety, and then the vending, having a business along the road that caused problems with the traffic, people stopping, not having adequate infrastructure in place to make it safe and sanitary for the sales area and so forth.

Q The area where I-40 traverses the Navajo Nation, are there any restrictions on anyone driving along I-40 across the Navajo reservation?

A Not that I know of.

[116] Q Does the Navajo Nation impose any regulations or restrictions on visitors who come to the Navajo Nation?

A Just the ones that I'm familiar with or aware of would be the ones that resources—I mean that the Navajo Tribal Council pass that might relate to visitation of park areas and visitation of camping and back country areas, hiking and so forth.

Q Now, you mentioned a couple of minutes ago about the national parks and national monuments within the Navajo Nation. Are those administered by the National Park Service?

A Yes. The ones within the Navajo Nation have all of them.

Q Would those include Canyon de Chelly, Chaco Canyon National Historical Park?

A Yes.

Q Hubble Trading Post National Historical Park?

A Yes.

Q Navajo National Monument?

A Yes.

Q And Rainbow Bridge National Monument?

A Yes.

Q Let me hand you this book, and let me have you turn to Exhibit No. 5 in that book. Do you recognize the cover page of that publication?

[117] A Yes.

Q What is that?

A It looks like Window Rock.

Q But what is the publication? I'm sorry.

A Okay. This is a Fax—a Navajo Nation Fax '93. I guess it's a compilation of information, statistical information.

Q Would you turn over to the third page of that exhibit, which is actually Page 127 of that book. Does that indicate—on the top part of that, does that indicate the various parks located on the Navajo Nation?

A And also some national monuments. I think these are adjacent to our—or within the Navajo Nation as well.

Q Now, the ones with an asterisk by the left-hand side, is it correct that those are within the Navajo Nation, except for Monument Valley, they are not under Navajo government jurisdiction?

A Yes.

Q Now, what is the National Navajo Nation Tourism Fund?

A What is it?

Q Yes.

A The Navajo Nation Tourism Fund was established by the Navajo Tribal Council, and the fund would be an [118] account that would be receiving revenues directly from the hotel occupancy tax.

Q So this is the fund that is used to—the money from the hotel occupancy tax goes into this fund and this fund is used for certain purposes; is that correct?

A Right. It's used for specific purposes.

Q And what are those specific purposes?

A Just by memorizing—not memorizing, but remembering the tribal council action and the resolution, it states that the tourism fund would be established to promote and develop tourism within the Navajo Nation at a local level.

Q Now, isn't it true that the Navajo Nation was spending money on tourism, developing tourism before the tourism fund was set up?

A Yes.

Q Let me show you this exhibit, and I don't have this in my book. Let me mark this as Exhibit No. 11. This is the part of the budget that has to do with the tourism department for Fiscal Year 1993; is that correct? I think some of the pages might have gotten upside down, I'm sorry.

A Yeah. This is it.

Q Now, this was the year before the hotel occupancy tax came into effect; is that correct?

[119] A Yes, I think so.

Q And during that year, during 19—well, the proposed budget for 1993 shows $403,000; is that correct?

A Yes.

Q And for 1992 it was $370,000, in round numbers; is that correct?

A 1992?

Q Yeah. If you look in the—okay. By the way, I'd like to point out and ask if this is correct, on the upper left-hand corner. The purpose was to increase tourism expenditures on the Navajo Nation by 10 percent?

A Uh-huh.

Q Again, the Navajo Nation looks on tourism as a positive thing; is that correct?

A Yes.

Q Now, if you look at the third page of that exhibit, that shows that the tourism department has eight employees; is that correct?

A Yes.

Q And about $300,000 out of the some $400,000 budget goes to personnel expenses, either direct expenses or fringe; is that correct?

A Yes.

Q Now, let me show you what I'll mark as Exhibit No. 12. Now, Exhibit No. 12 is for the Fiscal Year 1995; [120] is that correct?

A Yes.

Q And that shows a proposed budget of $700,000; is that correct?

A Yes.

Q Now, that $700,000, that is the expected revenue or anticipated revenue from the hotel occupancy tax; is that correct?

A This is projections given to us by Financial Services, and that authorizes us to budget for $700,000. And the revenues—as far as revenues are concerned, this 700 is less than the general revenues. I mean, the revenues that were expected.

Q I'm sorry, have you gotten more or less than the 700,000, as far as you know?

A Oh, we got 700,000. I was just telling you that it says it's for the full amount.

Q The hotel tax has generated more money than this; is that correct?

A Yes.

Q Where has the rest of that money gone?

A By tribal laws, 22 percent is put into two different accounts.

Q What accounts are those?

A I'm not sure exactly. One of them has to do [121] with—to ensure money is there for litigation. The other account is a trust fund, I think.

Q What's the purpose of that trust fund?

A That goes into the general revenue's general fund.

Q Now, looking at the specifics on this 1995 budget, the purpose is to make the Navajo Nation a prime worldwide destination that would create jobs and revenues for the Navajo people. So again, you know, promoting tourism is considered to be a positive thing in 1995; is that correct?

A Yes.

Q Now, looking at the personal services category, that's approximately the same as it was in 1993, is it not?

A Yes.

Q And if you look at Page 3 of that exhibit, you've still got eight employees in the tourism department, do you not?

A Yes.

Q And salaries and fringes are still right around $300,000, isn't that correct?

A Yes.

Q So, is it true to say that what you have done is to replace general funds—general Navajo Nation funds [122] with the hotel occupancy tax funds; is that correct?

A Yes.

Q Now, the only thing that I see here, and correct me if I'm wrong, the only thing that I see here that's in addition to the monies that the Navajo Nation was already spending on developing tourism is in the category of capital expenditures; is that correct?

A Yes.

Q Other than capital expenditures, the expenditures projected for 1995 are slightly less than $400,000; is that correct?

A Yes.

Q And in 1993, you spent approximately $400,000; is that correct?

A Yes.

Q Now, the capital expenditures that you got slated, that is for vendor villages, is that correct, the construction of vendor villages?

A Yes.

Q What are vendor villages?

A Vendor villages are facilities that would basically do two things. Number one is that it would provide for visitor services, and second it would provide for small business development.

Q Have you built any vendor villages yet?

[123] A Yes, we have.

Q Where is that?

A In Kayenta, Arizona.

Q Is that open yet?

A Yes, we opened that up.

Q When did you open it?

A In June.

Q Are any non-Navajo vendors allowed to rent spaces there?

A Let's see, non-Navajo vendors? I don't think we had any non-Navajo vendors ask us to sell there. But we are primarily targeting local Navajo arts and crafts.

Q So the purpose of it is to promote the ability of local people to sell their arts and crafts?

A Yes.

Q Is there a preference for non-Navajo—I mean, for Navajo vendors over nonmember vendors?

A What we're trying to do is bring the folks that are along highways into the vendor villages since they're safe. It's a much safer environment. And at the same time we want to bring the visitor there, and they would be able to get their visitor service needs met.

Q But my question was: Is there a preference for renting spaces in the vendor village to Navajos as opposed to non-Navajo?

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[124] A I would think so.

MR. DARLING: That's all the questions I have.

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HEARING OFFICER ADAMS: Well, I'm not going to ask that you submit the entire Navajo Nation budget for these two periods. We will accept these two documents as they have been introduced. If you have any additional questions about the budget procedures, you can submit it. You can present that portion of the budget and ask to testify on that. The Navajo Nation Fax Booklet is an official document under the Economic Development Division, and it is a private practice. And I think I indicated in one of the documents that I sent to you that we will take official notice of the documents other than that official document of the Navajo Nation. So I will take official notice of the entire booklet for this purpose.

[126]

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CROSS-EXAMINATION

BY MR. GOMEZ:

Q Mr. White, with respect to the vendor villages that Mr. Darling asked you about, was the major reason establishing these vendor villages to make it safer to sell these arts and crafts and other goods than selling them on the highway?

A That's a part of the reason, yeah. I would say that it's part of it. Can I elaborate?

Q Yes.

A The reason why I say that is because besides having our vendors off the main highways, in the right-of-ways that they are in now, we would like them to be in a facility that's nicer, that would accommodate their needs. On the other hand, we want the visitors that come to the Navajo Nation to have a better visit by having clean bathrooms and information available for them as to where they're going to be going or if they have questions on the Navajo Nation. When we do that,

at the same time, we feel that the local people and the visitors would both benefit at the same time because the vendors would then have their market that they could sell their arts and [127] crafts. So I would say there are two reasons.

Q In Exhibit No. 5, this is Page 127 of the Navajo Nation Fax '93, Mr. Darling asked you the question about some of the parts in there like Canyon de Chelly, Chaco Culture National Park, Hubble, Monument Valley, Navajo National Monument and Rainbow Bridge. The note at the bottom said, "Those situated within the Navajo Nation"; Hubble, Monument Valley, Tribal Park is under Navajo government jurisdiction. So you take that to mean that only the Navajo—the Monument Valley Tribal Park is operated by the Navajo Nation? Is that your understanding of what that says?

A My understanding is that the Navajo Nation owns Monument Valley and these national parks are monuments. All these that are within the Navajo Nation are owned by the National Park Service except Canyon de Chelly National Monument and a portion of the Navajo National Monument.

Q But those others, with the exception of Monument Valley, are operated by the National Park Service; is that correct?

A Yes.

Q Just to make sure that we're talking about the same budget here. What I'm going to show you is the resolution of the Budget and Finance Committee of the Navajo Nation Council, which is page—can you just read [128] the heading of that?

A "Recommending approval of the Fiscal Year 1995 Navajo Nation Budget and other Related Actions to the Navajo Nation Council."

Q Have you seen this document before in your work?

A The resolution?

Q The resolution and the following attached budget.

A I've seen this resolution.

Q Turn now to Page 395. Take a look at that page. Is that the same page that Mr. Darling asked you to take a look at earlier that has been introduced as Exhibit 12?

A Yes.

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[129]

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(Note: Exhibit B admitted into evidence.)

Q (By Mr. Gomez) In this—if you can open it to Page 395. Do you want to describe the duties and services that your department provides?

A Describe it?

Q Yes.

A Basically, the tourism department provides information to people that want to visit the Navajo Nation, and we provide them information to try to answer the questions they would have, depending if it's on recreation or if it's sightseeing and so on, parks and [130] rec, tourism activities, cultural, whatever. And in addition to that, we also want to market the Navajo Nation to bring new tourism dollars into the Navajo Nation. And in addition to that, what we want to do is to develop the tourism facilities, goods and services that do not exist now to better accommodate the visitors that come to Navajo Nation. So essentially, those are the three.

Q Do you serve the entire Navajo Nation?

A Yes, we do.

Q Is your office involved with the state, county or federal providers of tourism services?

A Yes. We work with the Arizona and New Mexico tourism offices. We do projects with them, such as familiarization tours for potential new business to Navajo Nation, familiarization education of tours for travel riders. It's just basically to promote the Navajo Nation through the state partnerships. We also work with other organizations as well.

Q As far as attracting visitors, what are the goals that your office is working toward in the way of service for tourists and other visitors?

A What are the goals?

Q Yes.

A Now?

Q Yes.

[131] A Existing goals?

Q Yes.

A At this time, we're working on several projects, and one I can categorize as vendor villages, visitor centers. Basically, we're working on Cameron, Arizona; Monument Valley; Utah; Shiprock, New Mexico; Chinle, Arizona. These projects are within what we feel is the heavy-use areas of the Navajo Nation as far as tourism where we would like to provide the goals and objectives of the vendor villages. We also have ongoing visitor services that we do at our department and that is answering all the inquiries that we get through mail or telephone, and that basically is sending out brochures, informational packets out to people that are answering questions or that—not answering questions but wanting ideas to plan for their itinerary, their trip out here. We also are working on motel development in Monument Valley. We also have another recreational vehicle park that we're working on in Ganado. So basically, that's what we're doing right now is following through with those projects.

Q Are you aware of your office ever performing a study to determine who's visiting out here regarding these tourists?

A Yes. I'm aware that a study was done prior to [132] my directorship at the tourism office. And, yes, that was done in 1990, or something like that.

Q Now, I'm going to hand you what we'll refer to as Exhibit C.

MR. DARLING: Do I have the same thing?

MR. GOMEZ: Yes. That's just the front and back.

Q (By Mr. Gomez) Is this the study you're referring to?

A Yes.

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Q (By Mr. Gomez) If you would turn to the first page there and tell us what the purpose of the survey was for.

A The purpose of the survey was to assess a demographic profile of Navajo land visitors.

Q I'd like you to just maybe go to some of the questions in the survey. One was—okay, based on the survey, what was the major consideration of selecting Navajo land for the visit?

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[137]

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MR. GOMEZ: Okay.

Q (By Mr. Gomez) I'd like to ask you to go through some of those questions that they ask there. The first one is: "QUESTION: Based on the survey, what was the major consideration for selecting Navajo land for a visit"?

MR. DARLING: What page is that on?

THE WITNESS: It's Question 3.

MR. GOMEZ: It's Question No. 3.

MR. DARLING: Okay. I see that.

Q Would you look at that question, Mr. White, and, based on the survey, what was the major consideration for selecting Navajo land for the visit?

A The people that responded said that they wanted to see historical sites, 68.26 percent. The other group was 51. Well, the next highest category is Indian culture experience, I guess, and the other was arts and crafts. Outdoor recreation came in after that. Then the next category was people that did business or was visiting a relative or friends, and then the special events was last. But the four highest ones are

historical sites, then Indian culture, then arts and crafts and outdoor recreation.

Q Could you go on to the next question there [138] that's about three or four pages down?

A Question 4?

Q Question 4. What other sites do these visitors plan to visit?

A They responded, again, the highest was people who came to visit. They wanted to see the Grand Canyon, then after that, Canyon de Chelly. The next two highest categories are Mesa Verde first, and then Monument Valley, and then Four Corners. The next is Window Rock and Chaco Canyon followed by Petrified Forest.

Q The last question, I think it's one question away. It's Question No. 7.

A "How long do you plan to stay on Navajo land?"

Q Yes. The question is: "How long do most of the visitors stay?" What are the responses to that?

A People are staying one day at the most. The next response was two days. And then right after that was three to five days, and then six or more days is the last category.

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[139]

(Note: Exhibit C admitted into evidence.)

Q (By Mr. Gomez) Going back to the '95 budget. If all the Navajo Nation general funding revenues for your program were cut, would there be an adverse impact on your department's ability to provide services at the current level?

A Yes.

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[142]

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CLARENCE BILAGODY

After having been first duly sworn under oath, was questioned and testified as follows:

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[143]

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Q What did you do before the five-month period that you're talking about? Where were you before that?

A I was stationed in the Tuba City Police District, actually stationed in a substation in the Cameron community.

Q Can you tell us if there is anyone there now at the place that you described?

A Yes, there is. To my understanding, my knowledge, there are two—actually, three police officers that are stationed out there. Do I need to give names?

Q Yes, if you would. If you know them.

A To my knowledge, Officer Jerome Dennison, who was also stationed out there when I was out there. But recently there is also Officer Leonard Williams, and [144] there's another officer, I don't know that officer's name, that recently graduated from the police academy.

Q Can you give a description of that district that you're talking about, the Cameron area district that that substation serves?

A The Cameron substation area is considered part of the southern portion of the substation and there is also what we call the northern substation. And the southern area that Cameron is in stretches all the way down from the Cameron community south all the way down to the reservation boundary which is Grey Mountain. It'll go east as far as it gets to Dilkon District and the Hopi reservation, crossing on the south side of the Little Colorado River, and also on the north side of the Little Colorado River, stretching north up to the Tuba City junction area, and it could be as far away as the gap. It'll stretch around to the west, toward the Grand Canyon, the actual canyon area of the reservation boundary

line west to the park boundary and come back around to the Grey Mountain area.

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Q (By Ms. Tapahe) Can you describe the police operations that you performed in that district when you were stationed there?

A There are many jobs that I've done in that particular area, not only myself but other officers that have been stationed out there, or officers from the local district is what we call them. As far as responding to [146] calls, we've gone to calls for disturbances within the Cameron community itself. Not only there but the highways. It's actually the whole Cameron southern substation area; accident calls, fire calls, panhandling calls within certain business establishments. We've had other calls of service, even down to providing directions for a lot of the tourists that come through there.

It's an area for tourists because they go through to the Grand Canyon and up to the Lake Powell/Page area. That's the main area for tourism, to even getting down to providing directions for these tourists.

Q Now, you mentioned responses to calls and accidents, fires. Can you elaborate a little bit on that?

A We've had accidents along the area within Cameron and as far as Grey Mountain, through that whole area up towards the Tuba City local district boundary line. We've had accidents at the 64 and 89 junction that goes to Grand Canyon. We have also had car accidents that have occurred at the turnoff into the Cameron Trading Post and the trailer court lot there. We've had accidents down north of there as well that we responded to.

Q Can you tell us what kind of individuals were involved in these accidents?

A At times we've had Native Americans. We've also had non-Indians who have been involved in these [147] accidents. Like I said, the main attraction out there is tourism. When you have that, we do have a lot of accidents that involve non-Indians who are tourists.

Q Can you elaborate on responses to calls concerning fires out there? You mentioned that you provide service?

A We've had a lot of fires in that area. Well, not—I would say a lot for that community, for the Cameron community, not there but elsewhere. We've had the most recent fire, when I was there, I remember was a fire that had occurred up at the—one of the employee's residence within the trading post compound. We had the porch and a mattress and some other property that was damaged on the porch area. I was called to that scene of the fire. By the time I got there, the people who had lived there put it out.

Q Can you describe any other officers who were Navajo Nation officials who had responded to that fire?

A Because Cameron is in an area that's out pretty much in a remote area, the nearest fire department or ambulance service that responds to any emergency calls involving accidents or fires, you have the Navajo Nation EMS for medical services respond to these calls involving accidents or fire. We also have the Navajo Nation Fire Department Rescue, and the Navajo Nation Fire Fighters [148] respond to any calls of emergency out there that involves accidents or fires. And even for this last incident that I told you about that I responded to out in the trading post compound, the Navajo Nation Fire Department responded to that.

Q All right. Now, if you know, describe how long the substation that you're talking about has been in operation in that area.

A To my knowledge, I've been with the police department for 11 years, and that substation there has been in existence since then. I know of officers that have been stationed out there prior to me coming on 11 years ago. I

don't know exactly how long it's been out there, but it was more than 11 years.

Q Okay. Back to your specific responses to calls, could you describe the state or county presence or the state or county response to these calls?

A To my knowledge, me being a Navajo Nation Police Officer, we respond to a majority of the calls there. As far as I've been working, I've had the state police, which is the highway patrol, come to back me up if I had problems either on the highway or within the trading post compound. I've never seen Coconino County, which would be the Coconino County—the only sheriff's department in that area would be Coconino County. The times that I have [149] been stationed out there I've never seen the county officer within that area. You see them sometimes on the highway a little bit, and the majority of his time would be spent in Tuba City, and that's where he was stationed out of.

Q Now, with respect specifically to the Atkinson Trading Post, the Cameron Trading Post property, can you describe the times that you have seen a state or county police officer?

A I worked a lot with the state patrol officers, the highway patrol, and a lot of times we would meet there to discuss some of the issues that would be going on. The majority of the times the highway patrol would be going to the area either to check their mail or go to the restaurant to have lunch or dinner, and a lot of times we would meet there. But that's the only time, pretty much, or when they would come to back me up on a call.

Q Describe how that works. Say someone dials 911, describe how the call comes to you.

A Since we are the primary law enforcement agency out there and the Navajo Nation has got a substation there, even the county knows this, and also the state highway patrol, if someone dials 911, to my understanding, we have had a problem with that because I think it's NCC that serves the

Navajo Nation. But there's some areas [150] within the Navajo Nation that are served by other telephone companies, and I know there is a problem as far as trying to get 911 situated because Cameron area is served by a telephone company out of Flagstaff area.

Q But do the calls eventually go to you—

A Yes.

Q —personally, or to the—

A The 911—to my understanding, when someone dials 911, it will either go to the county or the state, most likely the county.

Q What happens at that point?

A The county would go ahead and refer that call to our dispatcher by dialing our number and patching it through to the person who's calling, and that's how the dispatcher would get ahold of us and call us out to this call.

Q In answering calls, do you distinguish between Navajo Nation trust land and non-Navajo trust land? Do you make any distinction there when you answer calls?

A I don't. I really don't think it's—or when I take a call, I take it as if we were the primary law enforcement agency there. I wouldn't question whether it's my call or somebody else's call.

Q Is that the general policy as far as the Navajo Nation Police Department?

[151] A Right.

Q I see. Let's talk about, not specific incidents, but routine policies, routine actions on your part. Can you describe the routine—you're general routine in that area, in the Cameron area specifically near the trading post?

A When I was stationed there, because a lot of tourists and a lot of people go to that trading post compound because you have got the post office, you've also got the trading post, you've got also the trading post store and restaurant, and you've got the motel area. I've always considered that place that, and when I come on duty, I need to at least drive through

there at least once or twice to make a security check, and I make my rounds through there. Not only that, but at the same time, to get familiar with a lot of people there, the security officers that are working there at nighttime. It seems like where everything was happening, so that's where I would go. The RV park across the road, the same thing, and also the residences across the road which is also, from my understanding, part of the Atkinson area.

Q Could you give an estimate, say, daily, weekly, of the number of times you make routine patrols and routine security checks of that Cameron Trading Post area?

A Forty hours a week I'd say, probably, at least [152] my average going through that area would be at least twice per my shift. So it would be twice on a daily basis out of five days, so it would be 10 times that. That would be the average.

Q Now, let's talk about responses to the alarm. There's been testimony today regarding an alarm system at the Cameron Trading Post. Can you describe times when you had responded to that alarm going off?

A There are numerous times that I have responded to the alarm calls there at the trading post. There has been other times where I'm off duty but I'm subject to call where I've been called by my dispatch, paged up because the alarm has gone off. Most of the time it's at night, late at night between the hours of 11, 12, 1, 2, 3 o'clock in the morning. There was one time, I remember this, because it was an ongoing thing, the alarms coming on and every time I responded, all of them were false alarm calls. The one that really sticks in my mind is because I had gone down there real early in the morning, and we found out that it was a cat that had gotten into the attic. So there are numerous times, or a lot of times that I have been down there for these alarm calls.

Q Can you give an estimate as to the number of false alarms compared to the number of legitimate calls resulting from the alarm?

[153] A All of them were false alarms.

Q I see.

A It's not where anybody has broken into the place, that I have knowledge of.

Q I see. But you have responded, nevertheless, on a consistent basis to those calls?

A Yes.

Q Are you aware of any other officers, other than Navajo Police Officers who have routinely patrolled that 10 area?

A Yes. The time that I was stationed there, there was another officer by the name of Jerome Dennison who was also in that area, but he did not live in Cameron at the tour of duty, that was responsibility of that area. He 16 would be responsible for that Cameron area.

Q Is he a Navajo police officer?

A Yes, he is.

Q My question was: If there were other officers other than Navajo police officers; state, county or federal officers who routinely patrol and perform security checks?

A Not to my knowledge.

Q All right. Are you aware of any substations similar to the Navajo substation that are operated by [154] state or county government in that area?

A Not to my knowledge, no, not in the Cameron area. There is no other substation besides the Navajo Nation.

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CROSS-EXAMINATION

BY MR. DARLING:

Q Officer Bilagody, you're cross-deputized in the state of Arizona; is that correct?

A Yes, I am.

Q So you're deputized both as an Arizona police [155] officer, and also a Navajo Nation Police Officer, correct?

A Also New Mexico.

Q Also New Mexico. Now, when you're dealing with a nonmember of the Navajo Nation and you arrest that nonmember, you don't take them to Tuba City, do you?

A At times we do, yes.

Q But basically you put on your Arizona hat and take them down to Flagstaff, isn't that correct, the Coconino County Sheriff's Office?

A Yes, sir.

Q And, in fact, with your cross deputization, you're authorized to give tickets and to arrest people even off the Navajo Nation, are you not?

A Can you ask that question again?

Q Okay. Being cross-deputized in Arizona, you can arrest people and give people tickets, members or nonmembers off the Navajo reservation, can you not?

A Yes.

Q Now, how you react to a particular person depends on whether they're Navajo or non-Navajo, is it not?

A Can you ask that question again?

Q Well, let me nail it down a little bit more for you. If you see somebody committing a crime, and let's say it's a felony, you react to that person differently if [156] they're a Navajo or a non-Navajo, do you not?

A At times, yes.

Q Now, the Navajo Nation Police Department has a different process for Navajos or non-Navajos, do they not?

A At times, yes, because we always have the federal statutes that we could apply to both Navajo and non-Navajo—non-Indians.

Q Let's make that distinction. If you have a non-Indian who commits a crime on the reservation, that would constitute a felony?

A Right. We're talking about felonies?

Q Right. Let's talk about felonies. You would take that person to—one way or another, you would turn that person

over to the county authorities and the state authorities, would you not?

A In some cases, yes.

Q What cases would you not?

A There are some cases there that we need to handle right away, if we can't get a county officer out there. If we can't get a state officer out there, we'll take it. In most cases, we'll take a lot of the calls.

Q Yes. But what I mean is if you respond to a call and you make a determination that a non-Indian has committed a felony, you arrest them and you take them to the Coconino County Sheriff's Department, do you not?

[157] A Like I said, on some cases we do.

Q And what cases do you not do that?

A Well, it would depend on—what I'm trying to tell you is that we also have jurisdiction with the U.S. Government. So, you know, when you're talking about felonies, we could go either state or we could go to the federal government statutes. That's what I'm telling you. But we won't arrest a non-Indian on tribal charges.

Q That's right. You will not arrest a non-Indian on tribal charges. Now, do you remember me taking your deposition on March 14th, 1995, and on Page 24 asking you these questions and you giving these answers, starting on Page 24, Line 7.

"QUESTION: When you arrest a non-Native American in the Cameron community, what do you do with them? Where do you take them?

"ANSWER: We take them to Coconino County Jail."

Do you recall that question and answer?

A Yeah, probably.

Q Now, if it's a Navajo or other Indian that you arrest on what you consider to be a felony, you take them to the Tuba City jail; is that correct?

A Right. Unless there is a warrant for them we take them sometimes straight to the county jail.

[158] Q Okay. And that's if there is a warrant from where?

A The U.S. Government, the federal court system.

Q But if you observe somebody committing a crime you consider to be a felony who is a Native American, you take them to the Tuba City jail, do you not?

A Right.

Q And they go through the Navajo system rather than the state system; is that correct?

A Right.

Q Now, can the Navajo system prosecute Native Americans for felony crimes?

A No.

Q Where are those felony crimes prosecuted?

A Within the federal court system.

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DICKEY BAIN

After having been first duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. GOMEZ.

Q Would you please state your full name.

A Dickey Bain.

Q What is your present occupation?

A I work for the fire department as a fire fighter—well, fire chief right now. That's my title.

Q What is your official business address?

A Navajo Nation Fire and Rescue, P.O. Box 3066, I believe, Window Rock, Arizona.

Q How long have you been employed in your present position?

A You mean a fire chief's position?

Q Yes.

A I don't know what the PAF is through, but fire [165] chief for Navajo Nation back in '84 to '90, demoted to fire captain, and now I'm returning to fire chief.

Q When you were fire chief the first time, what did you do before that?

A Well, I was assistant from '82 to '84. And then before that I was in the military, U.S. Air Force, from '69 to '76 with their fire protection, also.

Q And would you please describe your educational background?

A Well, basically I finished high school and then went into the military and picked up the career in the fire service, and that's where I've been.

Q You mentioned you picked up a career in the fire service, was that in the military?

A Yes. That's where I started in the fire service.

Q I'm going to ask you to take a look at what's been identified as exhibit—this is the Navajo Nation budget. Is that our Exhibit B?

HEARING OFFICER ADAMS: B.

MR. GOMEZ: All right.

Q I'm going to ask you to look at Page 877.

A (Witness complies.)

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Q (By Mr. Gomez) Mr. Bain, under this budget, what is the purpose of the Navajo Nation Fire and Rescue Services?

A To provide fire protection on the Navajo Nation.

Q Could you describe, in general terms, what the Navajo Nation Fire Department—its operations?

A What they do as far as the operations?

Q Yes.

A We provide fire suppression and rescue, and a lot of the other rescue calls or emergencies that occur on the Navajo Nation. We have stations throughout the reservation like in, oh, Chinle, Kayenta, Window Rock, Fort Defiance and Tuba City, and they all respond out without any mileage limitation. We go out as far as, you know, within the reservation, where we're requested to go by anybody that's, you know, called in for assistance. Basically, to all the services of emergency cases, we're normally the first one contacted for any assistance like that.

Q Do you know where Cameron, Arizona, is located?

A Yes, I do. It's north of Flagstaff.

Q Do you know which Navajo Nation fire station [168] would serve the Cameron area?

A As I mentioned, I have Tuba City, which is District 4, as stationed into the city with the fire station, and a couple of fire trucks and a rescue unit.

Q As far as the services you provide, are they available to anyone who calls on Navajo Nation Fire Department?

A It's available to anybody that calls us, that we're called for an emergency. We respond to any situation to anybody, to assist anybody that calls the department.

Q Are you aware of any state or county fire stations located on the Navajo reservation in Arizona?

A On the Navajo Nation there's one, Ganado Fire District.

Q Is that the only one you're aware of?

A That's the only one I'm aware of, yes.

Q Are you aware if the Navajo Nation Fire Department has ever responded to a call from a tourist traveling across the Navajo Nation?

A Yes, many times. We've got tourist attractions in Chinle and Kayenta and Tuba City, and through here we get a lot of calls, yes.

Q When you respond to calls, do you distinguish between fee land or tribal trust land in answering calls?

[169] A No, we don't. In fact, we even respond out of our jurisdiction at times to assist in an emergency.

Q For somebody calling for like a fire department in Cameron, do you know what that number would be—that phone number would be in Cameron?

A It's the Tuba City Police Department, 283-3111, I believe. The Tuba City Police Department is where all the traffic is received. If the county, the sheriff or some other entity of law enforcement comes upon any kind of emergency, they usually refer it to—someone like the Arizona State DPS has a direct—or radio frequency or radio channel and there you can actually call Tuba City right off. Then they call our fire station.

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Q Are you aware of any agreement with other providers in the Cameron area?

A Mutual agreement?

Q Yes.

A No, we don't, not that we're aware of. We don't have any agreement with any other fire department or agencies as far as combining services to respond into Cameron. But there are volunteers and other state districts in the Flagstaff area, but we're the primary response into Cameron at this time.

Q Would you describe any nonemergency services that your department provides within the Navajo Nation?

A Besides the fire suppression and rescue, yes, we do have public education with the schools, with the general public, fire prevention inspections, some [171] training, and so on and so on. We do provide nonemergency service.

Q Just referring back to Page 877 and that budget. Is all of your funding from Navajo Nation general funds?

A Yes. Entirely all our funds are general funds.

Q So if all the Navajo Nation general funding was cut, would there be an impact on your department's ability to provide services at the current level?

A There would be, yes. It would curtail some of our responses; cut down, cut back, you know, that's probably what we would have to do. But overall, we try to—the last thing we want to wash out is the accrual, you might say, just to maintain minimum level and still respond, you know, to these emergencies.

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CROSS-EXAMINATION

BY MR. DARLING:

Q Mr. Bain, you said a minute ago that you had, and by "you," I mean the Navajo Nation Fire Department, have 20 to 25 paid and volunteer individuals at each station; is that correct?

A Yes.

Q How many of those people at the Tuba City [172] substation are paid and how many are volunteer?

A I have one paid and the other 99, whatever it is, is volunteer.

Q So there's only one full-time paid person at Tuba City; is that correct?

A Yes, with our department. We combine services with the Tuba City Bureau of Indian Affairs, also. So we have that available also to cover our area.

Q Well, we'll ask about BIA services in a minute. Now, with respect to your, and by "your," again, I mean the Navajo Nation Fire Department in Tuba City, you've got one paid person and then how many volunteers do you have?

A Anywhere from 20 to 24, I would guess.

Q Now, you say that your fire fighters are certified as Fire Fighter I and Fire Fighter II. Do all the volunteers have certification?

A No, we don't, not at this time. We have in-service training, but we have some people that are in the process of going through the training.

Q Does your training budget show up somewhere else in the Navajo budget?

A Training budget?

Q Yes. If you would look, please, at the Fire Protection Budget starting on Page 877.

A Yes.

[173] Q In the upper left-hand corner under "Expenditure Categories," we've got Personal Services, Travel and Per Diem, Supplies, Lease Rental, Utilities, Repair and Maintenance and CONT Services and Special Items. I don't know exactly what that is. Is training contained in one of those categories or is it in a separate place?

A If you go to 878—

Q Okay. Let's go to 878.

A —it breaks down more in detail the 2200 account, and Personal Travel Expense usually covers the expense in that area to allow people to travel and attend training.

Q So your budget for this year for training would be included in that number of $4,960?

A Yes. And the 2100 that were assigned vehicles, we use assigned vehicles to transport personnel down to the training sites.

Q Now, as I understand it, when a call comes into the Tuba City Police Department—first a call has to come into the Tuba City Police Department for you to have any hope of getting a call and responding to it; is that correct?

A Yes. Most all our paging is done by the police department.

Q And then the Tuba City Police Department will [174] call you and they'll call the BIA Fire Department, will they not?

A Yes.

Q And then, if they call you, and when I say "you," again, the personnel that you have on site, they will send out, how do they contact the volunteers to come in and respond?

A Each person is assigned a pager and the police department will page it out. And everybody, at that time, when the police department receives information, they'll immediately -- after that, everybody gets paged out and then they'll respond to the fire station.

Q Now, the BIA Fire Department, they also maintain a fire fighting facility in Tuba City, do they not?

A Yes.

Q And that's separate from the Navajo Nation's fire department?

A Yes.

Q And they have their own equipment?

A Yes.

Q And they have their own personnel?

A Yes.

Q And they will respond, also—if the call goes out, it goes out to both of you; is that correct?

A They normally monitor, and I'm not sure—I'm [175] sure they have some of our pagers, though. The two departments work together real close. Some of the equipment ends up with their personnel and so on, so they get the call at the same time.

Q And they also attempt to respond?

A If it is close, but we try to keep one station, or the BIA back to stand by local areas and not all caravan down to the scene. We try to maintain protection at the community and then send the rest of the crew down to the scene.

Q Would that depend upon how serious the emergency is that you're responding to?

A Yes. We do have three or four pumpers in the Tuba City area, so I believe the BIA has two pumpers and we have two pumpers. So the best thing to do would be to send the two pumpers down to where the fire is. Most of the time, if

it's three miles, five miles out beyond that, we send the two pumpers out.

Q Now, isn't it correct that you do have an agreement with non-Navajo Nation fire departments in other areas around the reservation?

A Would you repeat that again?

Q You were talking about agreements with other fire departments, and I thought you were saying that you did not have any other agreements. But you do have [176] agreements, for instance, with fire and rescue people in Gallup, don't you?

A No, we don't. We don't have any agreements with Gallup. We have an agreement with maybe Ganado. It's quite an old agreement. It might have been before my time that this agreement was in place, so I'm not aware of it.

Q Don't you have an agreement with respect to responding to problems that occur between here and along the highway between here and 666?

A Again, I'm not aware of any during the past four years. So I'm not too familiar with those documents that there was any.

Q Well, let me ask you: Do you have—well, maybe I'm using the wrong word there. Do you have any arrangements or understandings with any of the fire departments around the Navajo reservation?

A An understanding that we respond—or if I call on Navajo states, they would respond when we request for them to come out to, say, Benito (sic) to here. Yes, there is that kind of an understanding, being this is their district, right up here against the reservation or the state line, say Benito here is probably Navajo states, and we provide primary response into that area. We've had a lot of structural fires and brush fires in that area. But if it's serious enough or anything like that, they, [177] vice versa, would call on us. This weekend we were called out to a large brush fire down in Tsayatoh.

They needed our tanker. But basically, it's that kind of understanding.

Q Don't you have an understanding that the cutoff point for response between here and Gallup is the Sagebrush, along the highway?

A It would normally be. But if we're asked to go beyond that, we would respond beyond that. In fact, we were called out to a house fire a mile on the east side of Sagebrush. In turn, we figured Navajo state was closer so we paged them out.

Q In fact, even in the Flagstaff area, you have a general understanding with the state and county fire departments there that you will back each other up and you'll help each other out; isn't that correct?

A That probably is. But the distance is so far from Flagstaff to Tuba City that a lot of times the communications aren't there either verbally or whatever. The State doesn't normally send their trucks up towards the Cameron area. We don't really see them up there in that area. So only the Tuba City Fire Department responds down into that area.

Q Well, if the testimony yesterday was that there was a fire at Cameron Trading Post, at Cameron, Arizona, [178] and the only fire department that Cameron people saw on the scene was Timberline Fire Department, you wouldn't be able to say that that was incorrect, would you?

A I have not—my department has not reported Timberline being on the scene any time. The primary response has been Tuba City. The information I get is reliable to me from the Tuba City Fire Station.

Q But you can't refute that in a particular circumstance, as reported by the Cameron Trading Post employees, that the fire response came from Timberline and not from your people at Tuba City? You can't refute that, can you?

A I don't think so.

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REDIRECT EXAMINATION

BY MR. GOMEZ:

Q If you were to receive a call from the Cameron Trading Post, would you treat that call any differently than other calls from other places in the Cameron area?

A No. There wouldn't be any difference. They would all be treated the same. We would respond and take [179] care of the incident.

Q So when you receive a call, you would respond in the same manner as any other?

A Yes.

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FRANCIS BRADLEY

After having been first duly sworn under oath, was questioned and testified as follows:

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Q On state and federal highways, Navajo Nation Police patrol those roads on the reservation; is that correct?

A Yes, sir.

Q Now, being deputized in the State of Arizona, you can give citations on state and federal highways either on the reservation or off the reservation; is that correct?

A Yes, sir.

Q When you're on the reservation, you can give—if it's—say, if we're talking about speeding, okay? If the person who is speeding is a Navajo, you would normally give them a Navajo Nation citation; is that correct?

A Yes, sir.

Q In fact, if the person is a Native American of any nation, of any Indian Nation, you would give him a Navajo Nation citation; is that correct?

A Yes, sir.

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FRANCIS BRADLEY

After having been first duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. GOMEZ:

Q Would you please state your full name.

A My name is Francis Bradley.

Q What is your present occupation?

A I am a police captain within the Navajo Department of Law Enforcement, in the Division of Public Safety.

Q What is your official business address?

A P.O. Box 96, Chinle, Arizona.

Q How long have you been employed in your present position?

[195] A In my present position, I've been employed a year and one month.

Q What did you do before that?

A Prior to that, I was a police lieutenant in the Shiprock Police District. How far do you want to go back?

Q How long were you a police lieutenant?

A I was a police lieutenant for nine months in the Shiprock Police District. Prior to that, I was—I spent a year and a half, almost two years, as the acting commander for the Navajo Law Enforcement Academy.

Q Would you please give your educational background?

A I've got, oh, what do you want to call it, a little over one year in community college, and I'm currently working on

finishing up my Associate of Applied Science and Criminal Justice.

Q Every year the Navajo Nation is involved in a fiscal year budget. Have you worked on the fiscal year budget on behalf of the Navajo Division of—or the Navajo Division of Public Safety?

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[196]

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Q (By Mr. Gomez) I'm going to show you—this Division Funding Summary comes after Page 872.

A All right.

Q Can you tell me what that is?

A What this Division Funding Summary is, is it talks about all the programs within the Division of Public Safety, what funding they're going to be getting from not only the state—correction, not only from—well, yeah, from the state—state coffers, from the federal coffers, and then what the Navajo Nation is going to give each program specifically. So in this case here, this report talks about all of our general funding that we're going to be getting as not only a district of department of program on the division, but what the federal government is also going to give us, and what the totals are.

Q In looking at that, how much does it say the Navajo Nation is going to provide?

A Almost $5 million. When you put all the [197] programs together, the grand total is $4,982,476.

Q In going down those different categories, are those representative of what the Division of Public Safety carries on?

A Yes. Under the Division of Public Safety there are a number of departments, and all the departments are listed here, from Crownpoint Juvenile Detention to Fire and Rescue Services to Highway Safety and, of course, the Law Enforcement and Criminal Investigations. Everything is listed here in our division.

Q In describing the Navajo Nation Police operations, would you summarize how you view the Navajo Nation Police operations within the Navajo Nation?

A The Navajo Department of Law Enforcement is one of, I believe it's five now, departments in the Division of Public Safety—or five programs within the Division of Public Safety. The way the Department of Law Enforcement is broken down is it is headed by a Chief of Police, who answers directly to the Division Director who oversees the Division of Public Safety. The Chief of Police, in turn, has responsibilities and oversight over the Criminal Investigation Program and the Police Services Program. He also deals with the Detention Program, and he also deals with the Support Services, depending on where they are within the department. But he takes care of all [198] of that as well as the Division—correction the Department—district programs. We have seven districts within the Navajo Nation, as well as one training camp. He oversees all those of commanders in each one of those units, so he has a lot of them. The Department is broken down into a lot of different things. The Chief is the one who oversees everything.

Q In the course of your everyday work, did you ever see any state or county or federal officers providing police services within the Navajo Nation?

A Federal officers? We'll see them on maybe an every-other-day basis. If it's an FBI agent, if that's what you want to call from the federal government, yes, we'll see them like every other day. County officers? It depends. We seldom see those; maybe once, twice, a week or we'll hear them on the radio or something like that. Now the state officers, we'll normally see them probably—somebody will see them every day doing highway patrol work.

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Q Okay. Within the Navajo Nation, are your police services available to anyone who calls on you?

A Yes, anyone.

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Q I'm going to hand you what we're calling Exhibit D. Would you take a look at that and try to describe that?

A Okay. All this simply is, is on top it says, "Navajo Criminal Justice Information." We call that "NCJI" system. That's what we call it. All this does is tell me that between the 1st of January 1994, and December 1994, these are the officers' activities in certain areas: what they did, how much time they spent on it, what dates they provided the service, who the officer was, and the disposition of whatever the call was for that service provided. That's what this is.

[202] Q Could you maybe take us through an example? A Okay. Let's go to the second page. It's Page No. 2, and its says, "Date prepared, 5/1/95; time prepared, 0746. So it was in the morning. When you look at this NCJI report, first of all, in the left-hand side here, you have the column that has the date. When you look at the first one here, it says, "Date, 1/1/94; Time, 2300 hours, which is 11:00 p.m.; Activity, request watch or patrol; Time Received, 2300; Dispatch, 2300; Time Spent—I'm not sure if that's 39 minutes or not, but I'm pretty sure that's what it may be. But it says, "Assistance rendered complete. No report. The officer is it says "PO" at the end. That's all that is. It just tells you what he did during that time.

Now, what this report doesn't have on it is that each one of these calls for a service or the activity that's listed down, there is a number assigned to this and, in this case here—we call them CC numbers, complaint control numbers. Each service that's provided is reported on a CC card. That information, in turn, is what generates this report.

Q Turn back to Page 1, down on the left—sort of the left-hand corner, where it says, "grid."

A Right. Now, the other thing I didn't put on [203] there is, you see, these CC cards that we have, it will list who

called in the traffic, when it was called in, traffic meeting, what type of services were requested.

Let's say I call the police and say that I've got a suspicious person running around outside my yard here, can you send an officer over. That, in turn, will be listed down something like a suspicious activity or a request for a security check. That's where we end up getting into these different headings here. But the officer will be dispatched to come out and check. When he comes out and checks and he doesn't find anything, he'll call the dispatch back and tell them, "Look, I couldn't find anybody, but I did make the security check and everything is okay." At the bottom of that card, there is a place where we put our ending time in, when that activity was completed, and then on the back of the card, you would have a disposition code. A disposition code would tell you that—like here, where it says, "Assistance rendered. Assignment complete." That's where you would get that kind of information from.

Now, you would also—on that CC card, there are specific grids. A grid is an area—it's a number assigned to a specific area. In this case here, these reports are generated off of the grid code for the Cameron community. So that's where all this information comes [204] from. This information is specific to the Cameron community.

Q So let me hand you what I'll refer to as Exhibit E. This is a grid code. Most every place on the Navajo Nation has a grid code. Well, every place on the Navajo Nation has a grid code. Like for Page 1, where it says, "Grid, Cameron Community," that would be Grid 4HA; is that correct?

A Four Henry Adam, that's Cameron community. Now, that just gives—okay, Cameron Community, in general, you could say, "All right. Anything outside or close to or around this area would be Four Henry Adam." If it was the trading post or motel, the old state housing, it would be Four Henry Adam.

Q Could you turn to Page 20 of the main report?

A Okay.

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Q (By Mr. Gomez) Captain Bradley, would the patrolman who's identified on the right here, would they normally get this report?

A No.

Q Who utilizes this report?

A We would; anyone in command or anyone looking through statistics, things like that. It's available to—usually the more administration—the higher up the administration is and the type of information you're going to have access to. This isn't information that's readily given out to patrol officers.

Q What do the administrators utilize these reports [206] for?

A Statistical information on -- like in this case here, we're talking about Cameron. We're doing some kind of study or some kind of write-up for the Cameron area, and we would be going back to these reports here. This is the information we would be getting off of them, because it would be like how much time was spent there, what type of calls do we have there, what do we need to anticipate for that community in the next year coming up, three years, five years. Whatever type of program we're working on, this is the type of information we would go back and get, and specifically what shall we do.

Then again, it may come up into an investigation to where we have to track our officers' activities, something like—we always go back to these reports. "At this time, according to what he's saying, this is where he was at." All right. "This is what it has here." It just depends on what we're doing. But we would be dealing with these a lot.

Q So it's not something that the patrolman on the scene would utilize, but it's something that his supervisors would utilize for planning purposes or investigation purposes?

A Yes.

Q I'd like to ask you to turn to Page 20 of that [207] first report. Can you describe what Pages 20 and 21 are?

A Page 20 shows you—again, it tells you the dates and the times and the activities that the officers provided there. But it also gives you a breakdown from the time between 1/94 and 12/94. These are the type of services that were provided specifically to the trading post and motel and the old state housing.

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Q (By Mr. Gomez) So on Page 21, in looking at the 10 bottom left corner, would that be the grid for the trading post, motel, and old state housing?

A Yes, sir, it would be.

Q And the numbers listed there, that would be a summary of the total incidents, I guess, or items listed on the report; is that correct?

A The items listed on the report is a total summary from January 1st to December 31st, 1994, regarding all police—all incidents we answered in this particular community area and the type of complaints that were answered or checked into by the officers listed here. This is where we go back and say: All right. This is who did this; this is what they did; and how many times they're out there, answering these specific type of calls.

Q So the officers—there would be Clarence Bilagody—

[210] A Jerome Dennison, Raymond Butler. Those are the three that are listed down here. There's Terrance Logg.

Q And then if you look at Pages 22 and 23, that appears to be another grid code. Page 24, actually.

A Yes, it is. It's another grid code for the chapter house, the school, Huskon Village, I believe it is, and then the churches. Again, that would fall under our grid code system. When you look at this here, it has one general grid for the Cameron community, and then it's broken down into specific

areas within that community. So that's what this whole report is going to detail, is the different areas within the Cameron Community.

Q And this report covers—do you remember how many years this total report covers, besides '94? Does it go back to '93 and '92, also?

A Yes, it goes back. It goes back to 1/92 to 12/31/92.

Q So it covers like a three-year period?

A That's where it's going to tell you when that report was taken, what time span it runs. And then go all the way back up to the second page, where it talks about 1/1/94 to 12/31/94. It tells you everything about that specific time frame.

Q Thank you. This is the type of report that you would utilize in determining the needs of staffing in the [211] Cameron area?

A Yes, sir, it would be.

Q Or if you had an investigation going as to where an officer was—

A It would be used for just like you're saying: staffing, planning, evaluation, investigation. That's what we would be using this for. And this report here is—anywhere on the Navajo Nation, you get one generated for whatever the community is. Depending on what specific information you were looking for, you could pull it off of this. This is one type of report you could pull it off of.

Q So as far as planning is concerned, if you would look at the number of incidents, if the number was high enough, you may—you might assign additional personnel in the area?

A Yes, sir, it would be that area.

Q So if the number went down, you might pull back personnel; is that right?

A Yes, it would be. Again, it would be, depending on—okay, do we have a traffic enforcement problem? Do we have a domestic violence problem? Do we have a lots of burglaries? You know, what is the problem? We would be looking at that to see how we would be dealing with it.

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[213]

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(Note: Exhibits D and E admitted into evidence.)

Q (By Mr. Gomez) Going back to your everyday police operations, sir. Do you distinguish between fee land and trust land in answering calls?

A No.

Q Would you handle calls coming from the Cameron Trading Post, which is fee land, any differently than you would calls from other places in the Cameron area?

[214] A No.

Q If a call goes to the county sheriff, does that officer refer calls to you occasionally?

A Yes. In fact, any sheriff's department that the Navajo Nation deals with will almost automatically refer all calls that occur in or around the Navajo Nation, particularly within the exterior boundaries of the Navajo Nation, back to the Navajo Nation.

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Q Are there some nonemergency-type services that are offered by the Division of Public Safety?

A The Department of Law Enforcement, Division of Public Safety? When you talk about Division of Public Safety, you're talking about fire and rescue, ambulance, highway safety, all of that. You're going to have to distinguish—

Q I guess what—you are the police.

A The Department of Law Enforcement Office. Now, there are—it's like to make security checks, motorist assists. We call them relays, but it's taking people home, you know. I've got a number down—I can't use jargon. We do relays, we do different types—like opening doors, dog barking complaints, just things like that. Those are nonemergency-

type calls, disturbances—noise disturbances in particular, all kinds of things like that, changing flat tires, delivering babies. Well, I guess that would be depending on where you were at, emergency or nonemergency, but things like that.

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Q Could you describe your Highway Safety Program?

A Our Highway Safety Program? It's headed here in Window Rock by the Training Center. What they do is they provide—well, let's start off simply by saying that they do a lot of statistical information about crashes, causes of crashes all over the Navajo Nation, where we have high crash areas, how many DUIs there have been in specific areas, age range, things like—they do a lot of research into highway matters.

They also apply for a lot of grants and give a lot of grant money dealing with highway traffic safety deals [218] like buying radars, providing training for car seat use. They also issue Navajo Nation driver's permits to the employees of the Navajo Nation. So they do a lot of driver's training and things like that. They do a lot of surveys, planning, apply for grants, all kinds of stuff like that. So they're into everything.

Q Earlier we looked at the budget, and it was like $4.9 million of Navajo Nation general funds in your budget. If all of those Navajo Nation general funds were wiped out, completely cut, would there be an impact on your department's ability to provide services at the current level?

A Severely. It would be a severe impact upon the Nation, because right now, if you want to talk about the services provided by Emergency Medical Services, Fire and Rescue, their program services are not as extensive as ours, let's just put it that way, their law enforcement services. Those are the three emergency services that depend heavily upon the Navajo Nation's general funding to provide operating moneys for these departments. The Navajo Nation general funds provides a lot of the operating funds for our vehicles, our

supplies, our maintenance, our equipment. That's where we get our funding from for those specific items there. It also provides for overtime funding and some positions within [219] the division.

If you cut those out, if they were totally wiped out, then the services that have to be provided, essential emergency services, would probably be cut. Three quarters of the current existing services, I would have to say, would be wiped out or completely nonexistent, and then they would have to be farmed out to somebody else to provide.

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CROSS-EXAMINATION

BY MR. DARLING.

Q Captain Bradley, let's look at the budget for just a second.

A The one that I was originally looking at?

Q Right. What page was that?

A That was on Page 872.

Q The page I'm looking at doesn't have a number on it. I guess it's the bottom part of Page 872. The total budget for the Navajo Nation division is $27,125,965; is that correct?

A Yes, sir.

Q And of that 27 million, 22 million comes from the federal government; is that correct?

[220]

A Yes, sir.

Q So somewhat over 80 percent comes from the federal government; is that correct?

A Yes, sir.

Q Now, the State Highway Patrol does patrol state and federal highways within the reservation, does it not?

A Yes, sir.

Q And that would include U.S. Highway 89 through Cameron, and Highway 64 from Cameron to the Grand Canyon, would it not?

A Yes, sir.

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TULLEY MANN

After having been first duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. GOMEZ:

Q Would you please state your full name.

A My name is Tulley Mann.

Q What is your present occupation?

A Right now I'm a staff assistant with the Division of Health.

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Q I'm going to show you what's called a Divisional Funding Summary, and this is from the Fiscal Year 1995 Budget. Have you seen that document before, Mr. Mann?

A Yes, I've seen this document.

Q Could you describe services that your department provides?

HEARING OFFICER ADAMS: Excuse me, what page are you on?

MR. GOMEZ: This would be 972 and 973.

[233] Q Could you briefly describe the different services there.

A For each program?

Q In your own words, if you want to do it for each program or an overview, either way.

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Q (By Mr. Gomez) If you could maybe just briefly describe each program.

A It would be easy for me to just kind of very briefly describe to you each program's services. We'll go down the line, starting with the New Dawn Program. The New Dawn Program is primarily concentrated in the five BIA agencies on the reservation, and they work with each community. They're funded by federal funds, and it provides assistance to any member of the community, regardless of—it has to do with growing fruit trees, gardening around the house, the chapter, the community, and assisting with the different types of fruit [234] trees, vegetation, or whatever they need.

The Foster Grandparents is also federally funded and is matched with general funds. We provide services, and it's primarily concentrated on the reservation. It provides services to the children in school by elderly individuals that are able to pass on traditions to primarily Navajos in the schools, in the public school, BIA schools, whatever.

Then Kayenta Community Health Program is an assistant aid contract. It's a Public Health Nursing Program, and these are concentrated in the Kayenta area or Jeddito area, Black Mesa, Inscription House, Kaibeto area. If there has to be immunizations, they provide immunization to the school kids, public schools, BIA. Then Sanders Community Clinic is primarily—they subcontract with the doctors and nurses out of Gallup Indian Medical Center to provide services in the new lands area, some dental and some nursing services.

The WIC Program provides services to all individuals that are eligible to services under that particular program, for infants up to two years of age. It really doesn't matter what nationality they come from.

And then the Division of Health, that's the administration. We oversee and monitor the program operations of each of the programs throughout the field as [235] they level down to the field. It's primarily management and administering management contracts; federal, state and local.

And then CHR Program is primarily geared towards providing some assistance to all individuals on the Navajo reservations that need help or referral to hospitals for diabetes or whatever, TB, social hygiene and things like that.

The Food Distribution Program is primarily for low income people that need to have additional food, as far as milk commodities, things like that, surplus. There are no food stamps involved for low income individuals that are living on the Navajo reservation.

Shiprock Steering Committee. That's primarily concentrating on the facilities, construction design for Indian Health Services.

Health Education is a primarily geared towards the public that live within each of the communities, border towns as well as the schools. It's geared towards the public, regardless of what their nationalities are.

TB Control is a state contract which addresses TB cases referred by the county, the state or the CBC offices. And they do refer them to any public health services or county health services so they can be taken care of if they have a case of TB. [236]

Behavioral Health Services. That's primarily concentrating on alcohol problems, prevention and referrals of Navajos and other Indians that need services, as well as families and things like that.

The Omnibus Drug Program is primarily a drug prevention program throughout the communities and the schools.

Dilkon Steering Committee primarily concentrates on high interest in the facilities. That now exists in Winslow, Arizona. They're trying to promote a facility to be built in the Dilkon community.

The Navajo AIDS Program is primarily contacting people that have AIDS that are on or off the reservation and trying to work with them in the cultural setting, traditional setting, things like that. They also provide public education to each and all people that live in each of those communities, including border towns.

The Ft. Defiance Steering Committee is primarily looking at design, construction and planning for a new facility in Ft. Defiance Agency.

Male Minority is primarily dealing with male individuals that have alcohol or drug problems and how they can be rehabilitated or referred for counseling or rehabilitation.

New Mexico Health at Crownpoint. That's primarily [237] funds for the State of New Mexico to address alcohol and mental health programs or problems within the community, within the State of New Mexico, that are part of the Navajo Nation.

The NAAA Administration is overseeing the program operations of senior parents, foster grandparents, alcohol program. It's specifically geared towards individuals living on the Arizona portion of the Navajo Nation that have alcohol problems.

The Arizona Drug Abuse Program primarily is a community drug abuse awareness program for adolescents as well as adults.

Chronic Mental Ill-Toyei. That's just the tasking funds to work with the CMI individuals at Toyei facility.

Arizona Children's Service is a program primarily geared towards individuals on the Navajo reservation in the Arizona portion that have to do with alcohol and drug abuse problems.

The Intervention and Prevention Program is primarily the same thing in the Arizona portion of Navajo Nation. It's the same thing with the American Indian Health Program.

The NAAA Senior Program, they're all Older Americans Act, Title 6 and Title 5, programs. On the Navajo Nation any individuals that qualifies that is over the age of 55 [238] or 60 can utilize these services that are provided by the Senior Center Program.

Q Thank you. In looking at the funding sources for those programs, what are sources of funding for the total division?

A Most of the funding comes from the federal government, which is state—I mean, not state—the 638 contracts, or USDA contracts, 638 contracts. Then the

second largest funding is from the general funds appropriated by the Navajo Nation. The third portion of the funding comes from the state and private funding, funding through intergovernmental agreements with the states; New Mexico, Arizona; and then other tribal funds, like trust funds and revolving account funds, things like that.

Q How much funding from the tribal general funds?

A About $7 million.

Q A year?

A Yes.

Q What geographical area are these services provided to?

A All the services that I have described, the services are provided through the three states: Arizona, New Mexico, and a portion of Utah; and then satellite communities like Ramah, Canoncito, as well as border [239] towns. Like the WIC Program, they have an office in Winslow, and then we also have a network within the offices out of Kirtland, New Mexico.

Q Regarding the services, do you know where the Cameron is—

A Yes.

Q Is that area treated any different than any other portions of the Navajo reservation?

A No.

Q Do you have personnel who are assigned out into the different communities for some of these programs?

A For example, CHR is assigned to about 107 chapters—communities, and one of those works out of Cameron. Then WIC also—there are agencies in Tuba City, but they go out to the Cameron area on a periodic basis, on a monthly basis. Then we do have environmental health and sanitation inspectors that go out to each of these areas that have vendors who sell foods or any type of merchandise.

Q Could you describe how your office assisted with the identification and education on the prevention of regarding the Hantavirus?

A The Hantavairus primarily began in the Crownpoint area, in Four Corners, closer to the Four Corners area. We've identified individuals in each of [240] those areas primarily through referrals and/or when the individual is taken to the hospital. Then after that, what we did was with the money that we received from CDC, we implemented a prevention program to enlighten the public, not only Navajos, but also other nationalities, regardless of what it is and who it is. We had to deal the stereotypical stereotype label "disease," and then we had to overcome the particular barriers. And they found out about June 16th there has been 110 cases of Hantavirus throughout the United States, and approximately 51 percent have been fatal cases. The money that we use from the federal funds from CDC is also used to investigate and track all the areas, not only the Navajo reservation, but in other counties like Coconino County, who did work with each of the state health departments in identifying and promoting prevention.

Q In looking at your division's budget, if all the Navajo Nation general funds were removed from there, would there be an impact on your division's ability to provide services at the current level?

A Yes. For example, we wouldn't be able to operate a foster grandparents program because the federal government quits passing the money to the state and the state, in turn, contracts with us. They require matching dollars, local dollars. It's the same way with food [241] distribution that provides commodity foods for low income individuals. We wouldn't have an AIDS Program if we only depended upon federal funds. If we didn't have local matching funds for senior center programs, we wouldn't have a program. That's under Older Americans Act, Title 3 and Title 6.

MR. GOMEZ: I have no other questions. Thank you.

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CROSS-EXAMINATION

BY MR. DARLING:

Q Now, Mr. Mann, in looking at the budget, the total budget for your division is $45 million; is that correct?

A Yes.

Q About $45 and a half million?

A Yes, that's correct.

Q And of that, only $7 million comes from the Navajo Nation General Funds; is that correct?

A That is correct.

Q And if you include other tribal funds, you still have less than $8 million; isn't that correct?

A That is true.

Q And that's less than 20 percent of your total budget; isn't that correct?

[242] A I guess you did your math.

Q Well, if you'll double-check me, I wouldn't mind. I wouldn't feel offended.

A Okay.

Q Now, some of the programs that you administer through your division are available to whoever qualifies, whether they're Navajo or non-Navajo; is that correct?

A That is correct.

Q And other programs that you administer through your program are only available for members of the Navajo Nation or other Native Americans, isn't that correct?

A That is correct.

Q Now, in the areas where the programs that you have are available for nonmembers, there is state and federal funding to cover the costs of providing those services for nonmembers, isn't there?

A That's correct.

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MICHAEL DAVIS

Having been previously duly sworn under oath, was questioned and testified as follows:

DIRECT EXAMINATION

BY MR. DARLING.

Q Mr. Davis, you have previously been sworn in. Let me ask you a couple of questions with respect to the fire that occurred at the employee's residence out in Cameron, Arizona. Did you hear Officer Bilagody's testimony yesterday that the Navajo Nation Fire Unit responded to that?

A Yes, sir.

Q Did you see them there at the fire?

A No, sir.

Q Now, do other police and the Navajo Nation [248] Police routinely come by Cameron Trading Post?

A Yes, sir.

Q Who are those?

A Mainly the Department of Public Safety.

Q And that's the Arizona State Police?

A Yes, sir.

Q How often do they come by the property?

A At least once a day, usually twice.

Q When you have a problem in Cameron and you make a call, do the Arizona State Police ever come by in response to those calls?

A Yeah. I had an incident just a couple of days ago where they did.

Q Now, when they come by, do the Navajo Nation Police always come by as well?

A No.

Q And how would you—in your experience in being out there, how often do the Navajo Nation Police come by when the state police are there, also?

A Maybe as much as 50 percent of the time.

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CROSS-EXAMINATION

BY MR. GOMEZ:

Q You mentioned that since this litigation has begun, that you have seen the Navajo Nation Police quite frequently patrol your trading post; is that correct?

A Well, I've noticed them a lot more than I did in the past, obviously.

MR. GOMEZ: Is it possible to go back to [255] that question that was asked by Mr. Darling of Mr. Davis and repeat—

A Well, I said quite frequently. I mean, there is no need to repeat it.

Q So would it be correct that you have noticed the Navajo Nation Police patrol the Cameron Trading Post quite frequently?

A Yes, sir.

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Q What about that specific incident?

A Not that I can recall.

Q You mentioned that the Navajo Nation Police have responded periodically to alarms, and you mentioned the one incident that you said you talked about in your direct testimony earlier yesterday. Did Arizona DPS respond to that alarm?

A Which incident was that? I'm sorry.

Q The incident you just referred to that you referred back to yesterday, in your testimony yesterday.

A No, because—

Q So nobody responded to the alarm?

A No. You're talking about where the windows were broken in the dining room?

Q Is that the incident that you referred to?

A I think so, yes. Nobody responded.

Q The sheriff's department didn't respond, either?

A No.

Q And you said that your alarm rings where?

A Pardon me?

Q Where does your alarm ring?

A The alarm rings in Phoenix.

Q Who do they call?

A They would call—I'm not sure if they call the [257] sheriff's department and they refer it to the Navajo Police Department, or they call Navajo Police Department directly.

Q Are you sure they called the Navajo Police Department?

A Well, they showed up.

Q In that instance, are you sure that they're all Navajo Police Department?

A Well, they showed up a couple of hours later, without us having to call them.

Q So is it possible that they would not refer the call until later?

A I wouldn't think so. Usually the alarm company reacts very quickly.

Q But that was a possibility?

A Anything is possible.

Q You were talking about some juveniles—in looking at the report here on Page 20—juvenile disturbances. You contacted the Navajo police about the juvenile disturbances more than twice?

A Yes, sir.

Q Do you know where the juveniles come from?

A From the Cameron community.

Q Do any of these juveniles come from employee housing or Cameron Trading Post?

[258] A couple of them, yeah.

Q Have you taken any internal measures to deal with those?

A Yes. I've told their parents that they would lose the right of employee housing if they couldn't control their children.

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MR. DARLING: The only other thing that I have that I wanted to present was Mr. Watchman's testimony. I was originally told he would be here at 1:30 today, and now we don't know exactly when he is going to be here. We heard 3:00, and then we heard between 3:00 and 3:30. I would be just as willing to offer his deposition and use his deposition in this matter and go ahead and do our closing statements. I understand Mr. Gomez does not have any further witnesses, and then we can conclude this matter.

HEARING OFFICER ADAMS: Mr. Gomez?

MR. GOMEZ: We have no objection to [260] entering Mr. Watchman's deposition. The only thing we would like to do is to offer the depositions of Stella Saunders, Henry Wallace and Virgil Pablo that we raised. These were the three depositions of the people who were not present this week.

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HEARING OFFICER ADAMS: I can do that. With respect to the Tax Commission, Mr. Gomez, we have Exhibit A, which is the Reservation Business License; Exhibit B, which is the FY '95 Navajo Nation Budget; Exhibit C, which is a tourism and marketing survey; Exhibit D, which is the Navajo Criminal Justice

[261] Information System Officer's Report; and Exhibit E, the Police Grid Identification.

MR. GOMEZ: We had offered the entire Navajo Nation Fax booklet.

HEARING OFFICER ADAMS: Yes, I have that. We discussed that yesterday. The reason I haven't listed it is I don't think we gave it a number. So you tell me how you want to handle that. I agreed yesterday we would have an exhibit number.

MR. GOMEZ: The entire booklet.

HEARING OFFICER ADAMS: So do you want this to be—

MR. GOMEZ: That could be Exhibit F.

HEARING OFFICER ADAMS: Exhibit F. All right. Are there any other exhibits that should be considered?

* * * *

BEFORE THE NAVAJO TAX COMMISSION
THE NAVAJO NATION

Case No. 95-008

THE MATTER OF:

ATKINSON TRADING CO., INC.
Taxpayer.

DEPOSITION OF STELLA SAUNDERS

March 15, 1995

9:05 a.m.

Navajo Nation Department of Justice

Window Rock, Arizona 86515

PURSUANT TO SCRA 1986, Rules 1-026 and 1-030, this deposition was:

TAKEN BY: MR. WILLIAM J. DARLING
ATTORNEY FOR THE TAXPAYER

REPORTED BY: MABEL JIN CHIN, NM CCR #81
Bean & Associates, Inc.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico 87102

BY MR. DARLING:

[3] Q All right. Miss Saunders, would you please state your full name?

A Stella Saunders.

Q Ms. Saunders, have you had your deposition taken before?

A No.

Q I'll be asking you questions today. You need to listen to my questions. If you don't hear or understand my

questions, ask me to repeat or to explain, otherwise I'll assume that you are responding to my question. Okay?

What is your occupation or profession?

A Financial analyst.

Q Who do you work for?

A My direct supervisor or—

Q Well, let's say, what department do you work for?

A I work in the Support Services under Division of Economic Development.

* * * *

[6]

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Q Okay. In the interrogatories in this matter it says that you will be testifying in your testimony that you will describe the activities carried on by the Division of [7] Economic Development. You know, just describe to me what the Division of Economic Development does and what you expect to testify to about that.

A Okay. I need to look at my book and kind of refer to things.

Well, the division is primarily involved in creating jobs, income opportunities on the Navajo Nation. We get involved in planning large-scale commercial, industrial, and tourism projects. We also get involved in providing financial and technical assistance to small businesses on the Navajo Nation. The large projects can include anything from manufacturing, recruiting manufacturing industries to shopping centers, tourism resorts.

There are a number of different projects that we're working on right now. One of them is like Antelope Point, which is going to be up near Page.

We have some shopping centers that are still in the planning stages. We have built probably nine shopping centers throughout the Navajo Nation, and the shopping centers provide spaces to individual businesses. Most of them are anchored by a large grocery store, and then we have

the smaller shops for the Navajo, small Navajo business people.

Our division puts together the financing for those [8] projects, and then after it's completed, we turn them over to the Navajo Nation Shopping Centers and they manage the shopping centers. They are also under our wings, I guess, for the division, although they are kind of a quasi-independent organization.

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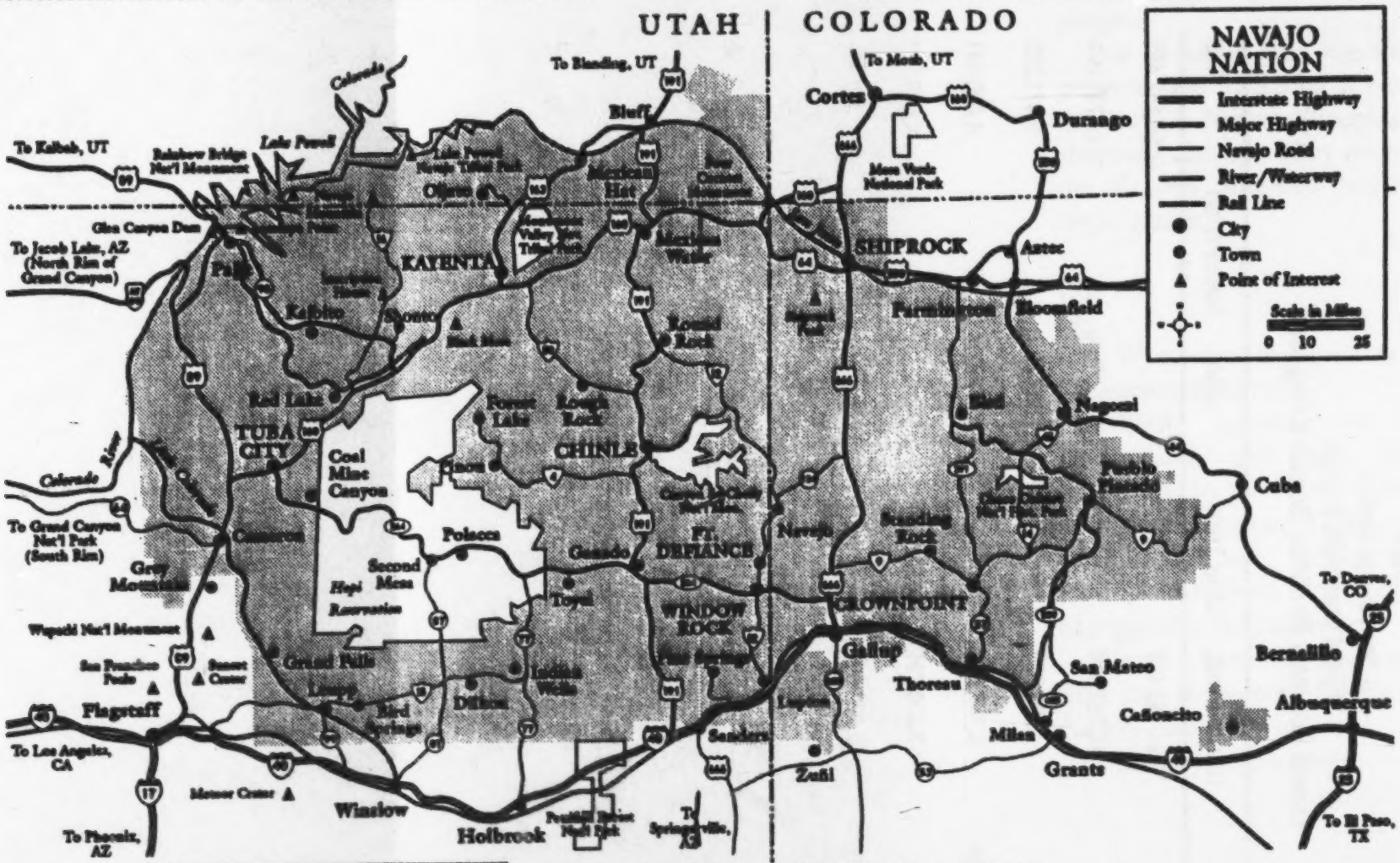
Q What other departments does the Division of Eco-nomic Development have?

A Well, currently we have Industrial Development Department, and their responsibility is for recruiting businesses to the Navajo Nation. They have done projects such as the Packard-Hughes project with NAPI. There is a facility up there. There's also another Packard-Hughes facility up in Fort Defiance. They helped that group do an expansion of the facilities.

Then we have the Tourism Development Department, and that, they are responsible for general promotion of the Navajo Nation regarding tourism. They also develop projects that deal directly with tourism.

Table 6
The Navajo Nation
Fiscal Year 1995 Budget
Overall Summary By Office, Branch & Divisions

Branch/Division	General Funds	Other Tribal	Federal	State/Private	Total
Executive Offices	$4,152,465				$4,152,465
Legislative Branch	16,788,074				16,788,074
Judicial Branch	4,590,895		$880,428		5,471,323
Division of General Service	4,755,554		234,887		4,990,441
Division of Finance	3,300,791	$748,000			4,048,791
Office of the Attorney General	5,202,634			$7,500	5,210,134
Office of Management & Budget	1,010,447				1,010,447
Office of the Tax Commission	1,343,056				1,343,056
Division of Economic Development	4,573,924	700,000			5,273,924
Division of Community Development	8,858,787	2,800,000	11,632,553		23,291,340
Division of Human Resources	6,072,704	2,132,012	14,576,556		22,781,272
Division of Natural Resources	15,650,952		15,053,286	310,739	31,014,977
Division of Public Safety	4,982,476		22,126,391	17,098	27,125,965
Division of Health	7,135,230	600,000	34,601,574	3,113,270	45,450,074
Division of Social Services	4,661,301		37,968,835	2,527,947	45,158,083
Division of Education	5,710,209	$3,343,250	$29,743,583	$1,569,379	40,366,421
Fixed Cost	7,993,087				7,993,087
Fixed Costs Credits	(11,804,586)				(11,804,586)
Tribal Grants	$2,292,000				$2,292,000
TOTAL:	$97,270,000	$10,323,262	$166,818,093	$7,545,933	$281,957,288



BEST AVAILABLE COPY

BEFORE THE NAVAJO TAX COMMISSION
THE NAVAJO NATION

No. 95-008

THE MATTER OF:

ATKINSON TRADING CO., INC.
Taxpayer.

DEPOSITION OF HENRY WALLACE

April 12, 1995

2:05 p.m.

Navajo Nation Department of Justice

Window Rock, Arizona 86515

PURSUANT TO THE SCRA 1986, Rules 1-026 and 1-030 this deposition was:

TAKEN BY: MR. WILLIAM J. DARLING
ATTORNEY FOR THE TAXPAYER

REPORTED BY: MABEL JIN CHIN, NM CCR #81
Bean & Associates, Inc.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico 87102

* * * *

[3]

HENRY WALLACE

After having been first duly sworn or affirmed under oath, was questioned and testified as follows:

EXAMINATION

BY MR. DARLING:

* * * *

Q Mr. Wallace, who is your employer?
A Navajo Nation.
Q And what is your position with the Navajo Nation?
A I'm a department director.
Q What department?
A Emergency Medical Services.

* * * *

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* * * *

Q Okay. What did you do or what have your duties been with the EMT department?

A There's a whole range of activities and the formula that I guess I use is the one that I mentioned earlier, that is, planning, organizing, directing, staffing, budgeting, and controlling. Under planning, I plan for the [7] department's administrative functions as well as operational functions.

Under organizing, I organize or I assist in organizing certain activities such as covering large-scale events, i.e. Navajo Nation Fair, things like that.

Staffing. I am responsible for all staff of a department. I also am responsible to maintain the staff at certain certification and licensure levels. I. e., all EMTs must be state licensed.

Directing. I directed the program and its goals and objectives. We have yearly goals that we have to set and work on and at, which is given—well, in guideline sense is given to us from the Indian Health Service who is our primary funding source, or I should say the Navajo area Indian Health Service.

Budgeting. I'm responsible to develop, maintain and monitor the four different budgets that we have. One being the Navajo Nation General Fund. Two, being the 638 grant

that we receive from Navajo area IHS, which is what it's called, a 638 grant. Three, New Mexico Cofund Act monies that we receive from New Mexico, which is used exclusively for our offices in New Mexico, and then the other account we have is what we call third-party reimbursement. It's monies that we collect from eligible beneficiaries, i.e., Arizona Access, New Mexico Medicare, [8] Medicaid, and so forth.

Controlling. I have to control all of those that I just mentioned, and one way I do that is in monthly reports, quarterly reports. I have to give statistics and I have to—I give reports to both the Navajo Nation and the Navajo Area Indian Health Service, and those are done, like I said, monthly or quarterly.

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[9]

* * * *

Q Okay. What services in general does the Emergency Medical Services Department provide?

A We provide two levels of patient care, one being basic life support, the other being advanced life support and they are both direct care services.

Q One is basic life support and what is the other one?

A Advanced life support.

Q What is the difference between basic life support and advanced life support?

A The administration of certain drugs, i.e, aspirin, Tylenol, IVs, intravenous solutions, those are not done by the basic. The basic is just basically to stabilize the patient when they arrive, check blood pressure, the vital signs, check for injuries, stop the bleeding, things like [10] that.

Q Okay. Then advanced life support?

A Advanced life support is the administration of those drugs, starting IVs, and—

Q Okay.

A —things like that.

Q What types of situations do you respond to? And when I say you, I mean your department.

A Okay. Virtually anything that's verified and bonafide, I guess is the way I should do it. Anything meaning dog bites, suspected child abuse, sexual penetration, motor vehicle accidents, people falling off horses, children spilling hot water on themselves, anything that a human being can get into, I guess.

Q Would it be correct to say that you respond to calls, to emergency calls?

A Yes.

Q Okay.

A That's correct.

Q You don't treat patients in a clinical environment at all, do you?

A I—the word "treat" would have to be defined, I guess. Our EMTs, when they respond to, say, like a motor vehicle accident, they treat the patient, quote, unquote, at the scene. They stop the bleeding. They cover up wounds [11] and they package the patient, put them in the ambulance, they are taken to the facility. At the facilities where the advanced care comes in, they do the x-rays. They administer other drugs which may be cardiac or cardiac-related if that's the case. I guess we do treat patients in or at the advanced level at the scene. But we don't set broken bones or things like that out in—out at the scene.

Q Okay.

A We make sure that further injury is prevented.

Q Okay. Where is the nearest facility that you have to Cameron?

A Tuba City.

Q And what is your—can you describe your facility at Tuba City?

A It is a hospital, I'm not too sure of what level. IHS has a categorical classification of these. It is a hospital. It has an ER. It has, I believe, two or three beds in the ER, and it's

staffed by physicians and nurses that are trained in trauma and emergency care work. To what extent, I don't know.

Q Okay. Now the nurses and physicians at the hospital do not work for your department, do they?

A No.

Q Okay. Do you know who they work for?

A Indian Health Service or the Public Health Service, [12] or whatever the appropriate title is.

Q Okay. Do any of your employees work at the hospital as such?

A They are stationed at the hospital. Therefore, they assist the physicians or nurses in the emergency room.

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Q And you have EMTs available on a 24-hour basis?

A Yes.

* * * *

[19]

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Q Okay. Now, if you do respond to an incident or an accident outside the reservation, are you compensated for [20] that in any way?

A Yes.

Q How are you compensated for that?

A We are allowed to charge the patients.

Q Okay.

A The insurance billing charges.

Q Would that come under the fourth category of funding that you have, which is third-party reimbursement?

A Yes.

Q Now describe for me all the methods by which you obtain third-party reimbursement?

A We currently, we only charge two fees, a flat call-out fee, and a mileage fee.

Q And what are those two fees?
A The call-out fee is $300.
Q And that's just for calling the ambulance out?
A Right.
Q You charge $300?
A Right.
Q And then what is the mileage fee?
A $6.25, I believe it is.
Q Per mile?
A Yes.
Q Now, do you get reimbursed that amount for all calls that are made?
[21] A No.
Q Okay. Which calls do you get reimbursed for and which do you not get reimbursed for?
A Those that become eligible under whoever's company that we're dealing with, coding system or guidelines.
Q Can you give me an example?
A Let me see. The one we have a lot of problems with I guess now is those that are classified that where an ambulance—let me see if I get this right—was not required.
Q Okay.
A A call where an ambulance was not required but our ambulance showed up. In other words, I guess I would—I guess I better describe, like, an ambulatory patient.
Q Okay. Somebody called the ambulance, but it really wasn't necessary because—
A Yes.
Q Because of the—because the patient was able to go off on their own, okay. All right. Now, are there any other kind of incidents where you don't get reimbursed?
A Our denials that we get back are really based on one of the discrepancies, mileage discrepancies. What's other another one that we have? Patient—a physician didn't sign the patient release form.
Q Okay.

[22] A No patient number.

Q Okay. Now, if you respond to a call where a member of the Navajo Nation was injured, do you get reimbursed for that?

A Yes.

Q And who reimburses you?

A A member of the Navajo Nation?

Q Yes.

A If their insurance is, if they are eligible under whatever insurance they may be carrying, then that insurance company reimburses us.

Q Okay. And if they don't have insurance?

A It's sort of a free service.

Q Okay. If it's a nonmember of the Navajo Nation who pays?

A Same thing. The insurance company of that person.

Q Okay. And you say you also get reimbursed by New Mexico Medicare or Medicaid or Arizona Access?

A Well, it depends on where the accident is. See, we operate in two states, actually three states, so if it's New Mexico Medicare we're dealing with, then the forms will go to that office.

Q Okay. Could you describe for me your relationship with the Indian Health Service?

A Good.

[23]

* * * *

Q Let me ask you first, what percent of your budget comes from funding from the Indian Health Service?

A Probably 90 percent.

[24] Q What kind of conditions are there for that funding? What do you have to do, in other words, to obtain the funding?

A We have to insure that we're going to assist Indian Health Service in and around the emergency room.

Q Okay.

A We have to insure that the funding, the dollars are directed toward the direct-care services. We have to insure that we're going to comply to, say, like the Drug In The Workplace Act. I guess it's a federal act that we have to comply to. And we have to comply to whatever standard laws, ordinances, that we deal with, and in this case, it's one of them is New Mexico EMS Bureau or where our EMTs are licensed.

* * * *

Q Okay. Now, going back to your funding sources, [25] then, the second funding source that you talked about, the 638 Indian Health Service Fund, that would be approximately 90 percent of your budget; is that correct?

A Approximately 90 percent.

Q And how much of your budget comes from the Navajo Nation General Funds?

A 286—somewhere around there, thousand.

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[26]

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Q And the Navajo Nation uses some of its general fund to give you the money to pay the leases?

A Right.

* * * *

Q Okay. Now, the New Mexico monies that you receive, what part of your budget is that?

A It varies year to year. It's—we don't get but like $30,000 or less.

Q $30,000 or less?

A From New Mexico.

* * * *

[27]

* * * *

Q Okay. How much of your budget is the third-party reimbursement?

A Very minimal. For an 11-month period I think it was, in between fiscal years, we generated I think it was $130,000.

Q Why is it so little? I mean, let me phrase that a different way. And maybe it's not so little, but let me ask it in a different way. Do you have anything that would show what percent of your calls get reimbursed?

A Not offhand. We would have to go back and kind of hand tabulate that.

Q Do you have any estimate as far as what percent of the calls are reimbursed?

A Right offhand, 60 to 70 percent.

Q Are reimbursed?

A Are reimbursed.

Q Okay. Do you know what—do you have anything that shows how many calls you respond to every year?

A Yes.

Q Okay. And do you remember approximately how many it was, for instance, for this past year?

A We haven't completed this past year's statistics. Last year we responded to over 5,000 calls.

Q Okay. Just not even counting mileage, at $300 a [28] call, that should have been reimbursement of about $1,500,000 and you recovered about maybe $130,000? Would that indicate you are really getting reimbursed for about 10 percent or maybe even less once you figure mileage in?

A Yes.

* * * *

Q Okay. Now, the 638 funding that you get from the Indian Health Service, are there any restrictions on that funding that would restrict it for use to Navajo Nation members?

A No.

Q Do you understand my question?

A Can you repeat that?

Q Okay. In the 638 funding that you get from the Indian Health Service, is that funding done pursuant to a contract?

A A grant.

Q A grant. Okay. And is there a contract that specifies the terms of the grant?

[29] A No.

Q Okay. In connection with the grant, are there terms and conditions that, written terms and conditions that you are given that restrict the use of the monies?

A Let me see. We cannot lobby with the money.

Q Okay.

A That's one of them.

Q Now, is that restriction on lobbying, that contained in a document?

A Yes.

Q how would you describe that document?

A probably in the form of a directive.

Q Okay.

A Now, on the application that we submit there are restrictions. We can't use—say, like we can't use the money to construct buildings. We can't use the money to disturb in any way grave sites, exhume bodies or something like that. It's—I think the name of it is compliance, grant compliance list.

Q Okay.

A Those are the only restrictions that I know that we have to abide by.

Q Okay. But whatever restrictions there are would be either in the application for the grant or the grant compliance list or the directive from the Indian Health [30] Service?

A Right.

Q Do you know if there's also any Federal Rules or regulations that you need to comply with in your use of the money?

A We are not to discriminate against color, religion, race, background, and we cannot refuse ambulance services simply because someone is—does not have the ability to pay.

Q Do you know what document that requirement is in?

A Under the compliance list, I believe it is.

Q Okay. Is that pursuant to a federal regulation?

A I believe so.

Q Okay. So if—if you had a person from New York who, you know, was having a heart attack here in Window Rock, you would have to treat that person; is that correct?

A Yes.

Q Regardless of whether the person had insurance or not; is that correct?

A Yes.

Q And without regard to, you know, why that person was here?

A Yes.

Q Okay.

A That's the law. That's a true heart attack.

* * * *

[32]

* * * *

Q Okay. If a call comes in, how do you know whether or not your ambulance is going to respond or Action Ambulance or Hopi EMS?

A Okay. Our ambulance is the primary response unit, meaning that they have priority. Action is only a transport vehicle, which means that they are not authorized to respond unless we ask them to. Hopi EMS responds only to the Hopi communities within Tuba City. And I think there's two of them.

Q Okay. Does your EMS respond to any calls from the Hopi community?

A Yes.

* * * *

[33]

* * * *

Q Do you know whether or not your EMS would respond to—well, let me ask you first. Are you familiar with the situation in Cameron Trading Post in that Cameron Trading Post is located on fee land rather than on reservation trust land?

A No.

Q Well, let me tell you that it is located on fee land. Does that make any difference in whether or not you would respond to a call to Cameron Trading Post?

A No.

* * * *

[36]

* * * *

Q Do you know if you have an agreement with anybody regarding the Cameron area?

A No. It's just more of like, well, you respond here and we'll respond here, or if you guys get called first, you'll go; if we get called first, we'll go. It's a mutual understanding, I guess. It's not—it's not formal.

Q Okay.

A But then we—some of those people have said let's do away with the paperwork and let's just do our jobs. You know. It's—

Q Respond to whoever needs help?

A Yes. Exactly. It's—

* * * *

[37]

* * * *

Q Okay. Is the amount that you charge for response and mileage, is the intent of that to cover the cost of responding?

A It's an average we took of numerous ambulance entities located around the south region, western-something area.

Q Okay. And is that the average of what they charge?

A Yes.

Q Okay. And—let me ask you again, then, is the intent of that charge to cover as much as possible the cost of responding?

A Yes.

* * * *

BEFORE THE NAVAJO TAX COMMISSION
THE NAVAJO NATION

No. 95-008

THE MATTER OF:

ATKINSON TRADING CO., INC.
Taxpayer.

DEPOSITION OF VIRGIL PABLO

April 13, 1995

10:40 a.m.

Navajo Nation Department of Justice

Window Rock, Arizona 86515

PURSUANT TO THE SCRA 1986, Rules 1-026 and 1-030 this deposition was:

TAKEN BY: MR. WILLIAM J. DARLING
ATTORNEY FOR THE TAXPAYER

REPORTED BY: MABEL JIN CHIN, NM CCR #81
Bean & Associates, Inc.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico 87102

[3]

* * * *

Q Please state your name for the record?
A Virgil Pablo.
Q What is your business address?
A P.O. Box 4590, Window Rock, Arizona.
Q Okay. Are you an employee of the Navajo Nation?
A I am.
Q What is your position?
A I am a department director.

Q And which department?

A With the 638 Contract Administration Department.

* * * *

[5] Q What is the 638 contract?

A 638, I guess it makes reference to Public Law 93-638. This is a law that was passed in 1975 where it authorizes Indian tribes to administer programs that would otherwise be administered by the funding agency, the Bureau of Indian Affairs, and in this case, social services had been administered by the Bureau of Indian Affairs and in the early 1980s under this authority of the law, the Navajo [6] Nation entered into a contract whereby now the Navajo Nation administers those social services programs.

Q What social services programs are covered by the 638 contract?

A Basically, there are six components within this particular contract. We have a number of other contracts under the division, but for this particular contract, the six components are first, general assistance, which is financial monetary assistance that's provided for eligible applicants. We have a tribal work experience program, a child welfare assistance program, adult institutional care as a fourth component. There's a fifth component, miscellaneous assistance, which entails emergency-type line item. And then the sixth component is our administration, whereby we hire our social workers, caseworkers, and provide funds for program operations.

* * * *

[1]

BEFORE THE NAVAJO TAX COMMISSION
THE NAVAJO NATION

No. 95-008

THE MATTER OF:

ATKINSON TRADING CO., INC.
Taxpayer.

DEPOSITION OF DERRICK B. WATCHMAN

April 13, 1995

1:25 p.m.

Navajo Nation Department of Justice

Window Rock, Arizona 86515

PURSUANT TO THE SCRA 1986, Rules 1-026 and 1-030 this deposition was:

TAKEN BY: MR. WILLIAM J. DARLING
ATTORNEY FOR THE TAXPAYER

REPORTED BY: MABEL JIN CHIN, NM CCR #81
Bean & Associates, Inc.
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico 87102

* * * *

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* * * *

DERRICK B. WATCHMAN

After having been first duly sworn or affirmed under oath, was questioned and testified as follows:

EXAMINATION

BY MR. DARLING:

Q Would you please state your name, sir?

A Derrick B. Watchman.

Q Okay. And what is your business address?

A My current business address is Dine Power Authority, P.O. Box 3239, Window Rock, Arizona, 86515.

Q And what is the Dine Power Authority?

A The Dine Power Authority is a Navajo Nation enterprise, charged with transmission and generation project development.

Q Okay. And what is your position with the Dine Power Authority?

A Presently I'm the general manager.

Q How long have you been there?

A Since August of '93 -- almost two years.

Q Okay.

A 18 months, I guess.

* * * *

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* * * *

Q Okay. Before you went to work for the Dine Power Authority, had you previously been employed by the Navajo Nation?

A Yes.

Q Okay.

A Many times.

Q All right. Could you give me just a brief recap of your employment by the Navajo Nation?

A Let's see. I started in 1984 as a budget analyst in the Office of Management and Budget, division or program. And then I moved to program evaluator within the Office of Management and Budget. In 1987 during the summer I was a consultant to the Navajo Tax Commission. I was doing some

economic work. In let's see, the spring or—yes, the spring of 1988, I was selected as the acting [5] executive director of the tax department, Navajo Tax Commission. I was there for a year. And then in 1991 I came back as the executive director of the Navajo Tax Commission and I stayed there through August of '93 as the director.

Q When you say you came back, had you gone—had you worked anywhere else in the interim between the time that you were acting executive director until you came back as executive director?

A Yes.

Q Where were you working?

A I had two functions. One is, after I left as acting I was appointed to the Navajo Tax Commission, so I was doing some work here, but I was living in New Jersey, working for Prudential Capital, a subsidiary of Prudential Insurance Company of America.

* * * *

[6]

* * * *

Q What education have you had since high school?

A I have a bachelor's in finance from the University of Arizona. I have a master's in business administration from the University of California at Berkeley.

Q Okay. What part did you have in developing the hotel occupancy tax statute?

A As director of the tax commission I had complete control of all the development of the HOT tax

Q Okay. HOT tax, you mean the hotel occupancy tax?

A Yes, the acronym.

Q Had development started before you came as executive director of the Navajo Tax Commission or did that start under your direction?

A The hotel tax was started under my direction.

Q Okay. And how did you get the idea to start it?

A I guess from many activities. When I was a [7] consultant to the tax commission I did a comprehensive study as to potential tax bases and potential taxes that may or may not be on the Navajo reservation. When I moved into the directorship spot, we recognized that the declining trend in the overall tax revenue base and based upon advice from the tax commission it was recommended that we look at other potential tax sources.

Given that the Navajo Nation is geographically located in areas that have pristine sites, Monument Valley and that kind of stuff, it's an economic given that tourism is a big potential and a market right now on the reservation, so we have taken those factors, looked at what kind of taxes could we possibly design, study, and recommend to the counsel. We looked at several types of taxes. And we, during that point of the hotel development process or during that time we were looking at taxes, we said, well probably the hotel tax would be one that we could present to the council and they would go along with it and adopt it.

Q What other types of taxes were you looking at?

A We were looking at a modification to the business activity tax, where we would overhaul it to make it look like or not make it look, but make it a gross receipts tax. We were looking at an income tax, a Navajo Nation income tax. We were looking at a gasoline tax, and obviously the [8] hotel occupancy tax.

Q What process was followed in presenting the hotel occupancy tax to the commission and passed by the commission—I mean by the council, I'm sorry?

A The council? Is that what you are saying?

Q Yes. What I want to understand is the process that you go through with the Navajo Nation in developing legislation of this sort, presenting it to the council and obtaining council passage?

A Okay. Pursuant to—well, pursuant to Navajo Tax Commission Rules and Regulations, there is a process that

you have to follow and then there's Navajo Code procedures that you have to follow.

First, in any tax, you obviously assess and determine its feasibility, you draft it. In drafting it you work with legal counsel. In our case our legal counsel is the Department of Justice. From there, after we and staff determine its feasibility, its technical merits and its readability, and all those other issues that are involved into it, we present it to the tax commission. I don't remember all the details, but I know that we—the Department of Justice and myself reviews it and we decided it was a go ahead. We presented the proposal to the tax commission. They adopted it. After that, we had public review of the proposal. After the review, we sent it [9] through the SAS process, the tribal review process. After the SAS, it went to the Navajo Nation Council Economic Development Committee. From there, it went through SAS process again, and it went to the Navajo Nation Council for adoption or review, deliberation, and in the case of the hotel tax, adoption.

Q Okay. Who assisted in drafting the hotel tax?

A The Department of the Justice Tax Unit lawyers.

Q Who in particular helped with that?

A In particular, the person that I dealt with a lot is James Bellis.

Q Is he still employed by the Navajo Nation?

A I think so. Is he? Yes.

Q Okay. Now, I take it that the other taxes that you are looking at, the gasoline tax, gross receipts tax, and the income tax were, in fact, not adopted?

A We never presented any proposals to the tax commission or the council.

Q Okay. On any of these three?

A Well, I take that back. We did draft potential legislation, but in looking at feedback from the council and looking at feedback from the committee, it was felt that the hotel occupancy tax was one that we could get through and

have the council adopt with less controversy, with less criticism and what have you, because prior to that, I guess [10] the latest tax that was presented to the council was in 19—early 1980, so it had been over ten years, and the Navajo Nation Council had never taken up a tax proposal in about ten years. So, in line with increasing tribal revenues, in line with trying to have the least resistance and demonstrating that the Navajo Nation, you know, can and continues to exert its tribal sovereignty, we felt that the hotel tax would be the best tax to take at that point.

Q Why did you feel that it was the best tax to take to exert tribal sovereignty?

A Why is it the best tax? Let me think about that. Well, in our public hearings it was felt that because we're a tourism-based economy here for the most part, and if you look at other governmental sovereigns, you usually try to lessen the tax burden on your residents, your taxpayers, and transfer that tax to a transient type of consumer. Based on our, and my information, and with what we saw out in the economy, Navajo Nation economy, we felt that the hotel tax would be the best in that, you know, we would have a tax base for the Navajo people vis-a-vis travel, government budget appropriations, and there would be less impacts on the people that live in the area. And if we could pass a tax on, and that's what a tax is, you past it on to the final consumer. In this case it would be the hotel occupant.

[11] Q Okay. And is it, would it be correct to say that part of your thinking there was that most of the guests at the hotels would not be members of the Navajo Nation?

A We didn't think of it that way. We thought about it as the hotel users.

Q Okay. But the hotel users?

A The occupants.

Q The occupants. You know, you talked about those mainly being tourists?

A Right.

Q So those would be presumably mostly nonmembers of the Navajo Nation, would they not?

A I guess. I don't want to—

Q Well, you talked about you wanted to impose the tax on a transient population rather than on people who are living on the Navajo Nation; right?

A Right.

Q Okay. And you know, the other types of tax that you were considering, those would have a much—much larger, much larger percent of those taxes would end up being paid by members of the Navajo Nation presumably, wouldn't they?

A Presumably, but again, getting back to the historical perspective that I learned, and that is that the nation had not adopted any taxes for over ten years. [12] And that right now a general consumer, you know, Joe Navajo and all that, they don't have to pay any taxes on the reservation. And we felt that we could possibly do a tax like a gross receipts or a sales tax. We could probably get it through the council, but it will take a lot of public education before we could do that. I think back in that particular year, 1992 or '91, revenues are starting to decline, so we needed to add another tax component to the revenue base, and the same time present something to the council that we knew that we could have acceptance by the council and adoption.

Q Okay. But now going back to the impact of these taxes, and let's look at the gasoline tax and compare that to the hotel tax.

A Uh-huh.

Q The gasoline tax, a lot larger percent of that would end up being paid by residents of the reservation as opposed to a hotel tax, wouldn't it?

A Say that question again, please.

Q Wouldn't a gasoline tax have a much—I'm sorry, let me rephrase that. Wouldn't the residents of the reservation

pay a much larger proportion of a gasoline tax than they would have a hotel occupancy tax?

A Yes. Because a lot of miles are driven on the reservation because we just don't have the [13] services here, so—

Q Okay.

A Yes.

Q Did you feel that it would be politically difficult to get a tax through that would have that much of an impact on members of the reservation? Residents of the reservation?

A I guess—I don't know how to answer the political question, but one that would have acceptance by the council as a proposal that would bring in revenue yet would not have such a high impact to Navajo residents, yes.

Q Okay. And of the four taxes that you mentioned, wouldn't it be correct to say that the hotel occupancy tax would have the least impact on residents of the reservation?

A Right. Yes, it would.

Q Okay. Now, I guess I still don't understand your use of the phrase a minute ago, of that the hotel occupancy tax gave the Navajo Nation the opportunity to or would have given them the greatest opportunity to exert their tribal sovereignty. Could you explain your use of that phrase a little bit more?

A I guess with—well, I can explain it the best I can. There is still not a whole lot of respect for Indian governments by outsiders and by businesses and what have you. Businesses and oil companies, hotel companies, [14] whatever, still believe that Indian tribes are archaic, have no status as a government, as a people. And that we could—I could feel it in the public participation, that you don't have any authority because you are a tribe. Yet they don't say that to us, to a state government. And it was pretty clear in a lot of the work that I did that, you know, these people just don't have the respect. So in terms of exerting tribal sovereignty, one way that Navajo government could operate and should

operate is utilizing its tax base, and it was found that the hotel occupancy is a real good tax base.

Any government, Albuquerque, whatever, they capitalize on the tourists. You go to Albuquerque or whatever, you see hotel occupancy tax in the 10, 20 percent range. And that, you know, you try to lessen the burden on your residents and pass it on to people that, you know, flow through.

So, in looking at Navajo taxes and looking at what has transpired, you know, from day one when the tribe, a tribe tried to enact this tax up until 1984, when the Navajo Nation had to go to the Supreme Court and have the Supreme Court say, "Yes, you can tax," all that is kind of in the air and it still circulates today that, you know, people just don't respect the taxing ability of the Navajo Nation.

So it was felt that we would have the least [15] resistance with the hotel tax, yet we could say, "Well, the Navajo Nation is still a viable"—well, Navajo Nation is a government and these taxes extend its governmental powers, so you know, that's just how, that's how I looked at it in putting together the hotel occupancy tax proposal.

Q As part of the development process did you look at what hotels would be impacted by the hotel occupancy tax?

A Yes, we did.

Q Okay. Are any of the hotels that are impacted by the hotel occupancy tax owned by Navajos?

A That's not—that wasn't an issue.

Q Okay. I'm not saying it was an issue or not. I'm just asking you if there were.

A It's not an issue, so we didn't look at it.

Q Do you know that? Do you know whether or not any of the hotels that are impacted are owned by Navajos?

A It was not an issue, so I don't know.

* * *

[17]

* * *

Q Okay. Could you look through these pages of that exhibit starting at page 1, and tell me if you know if any of those motels or hotels are owned by either Navajo Nation Enterprises or the Navajo Nation or individual Navajos?

A No. I can't tell.

Q Okay. You don't know?

A No.

Q Okay. And there are several pages. If you could leaf through those pages and tell me, if you know?

A No.

Q Okay. On page 3—

A I do know that the Navajo Nation Inn is a Navajo Nation Enterprise.

Q Okay. Is the Navajo Nation Inn subject to the hotel occupancy tax?

A Its customers are.

Q Okay. So, they do collect tax from the customers?

[18] A Yes. They do.

Q Okay. And is there anything on page 4 that you know if it's owned by the Navajo Nation or not?

A No.

Q Or any individual Navajo?

A I don't know.

Q Okay. On page 5?

A No, I don't know.

(Exhibit 21 was marked for identification.)

Q (By Mr. Darling) Could you tell me what Exhibit Number 21 is?

A Exhibit 21 is an Office of the Navajo Tax Commission Tax Education Campaign for the Navajo Public—it's—I guess it's a description of certain things that have gone on with the tax program and what's—it's an explanation of the Navajo tax program and the taxes that the Navajo Nation has.

Q Okay. When was that prepared?

A This was prepared and modified on several occasions. I don't recall the exact date, but upon my coming in as director of the tax program, the first question that was asked is, who are you guys, you know, and so, when I decided to put this type of information, piece it together to explain to the public that the Navajo government does have kind of an IRS type of program, and that it's [19] better for their information to know about it. So in here we address the current taxes and some of the proposals and what the Navajo tax program is all about.

Q On the fifth page of this exhibit does that paragraph represent what you said before about tax revenues in the Navajo Nation declining?

A It does.

Q Okay. On the 7th page of that exhibit it talks about some potential tax sources?

A Uh-huh.

Q One of those you hadn't mentioned before is a general property tax. Had that gotten to any sort of drafting stage or was that just a thought that was never acted on?

A The general property tax is drafted and was presented to council in, I guess in the mid '80s or something, but never went anywhere. To some folks it's still a proposal. To others it wasn't, but to those that thought the GPT is still something, we include that particular line here, but it's something that's been around. The GPT is a proposal to modify the PIT, the Navajo PIT.

Q And what is the PIT?

A The Navajo possessory interest tax.

Q Okay. What does a Navajo possessory interest tax [20] apply to?

A It applies to possessory interest.

Q In what kind of possessory interest?

A Navajo possessory interest.

Q Could you give me an example of the type of possessory interest that would be subject to the tax?

A Navajo mineral leases.

Q Okay.

A It actually applies to all leases.

Q Why was the Navajo hotel occupancy tax constructed so that the revenue went to the tourism development fund?

A If I recall correctly, that was an addition during the council session that the council delegates decided to do.

Q Okay.

A Earmark—in other words, they earmarked the fund.

Q So that wasn't in the original proposal given to the council, then?

A No, it was a thought of the -- not the thought, but the philosophy of the commission to not direct where the money goes. The tax commission responsibility was to provide revenue sources through taxes, and that it's up to the council and/or its committees to decide where that money ought to be used.

Q Okay. Do you have a copy of this document? It's [21] the Resolution of the Navajo Tax Commission.

A Uh-huh.

Q Do you have it available where you can look at it while we—

A Where is that?

Q Okay. This was Exhibit 7 to Harlan Charley's deposition. What does it mean in paragraph 4, that "The initial impact of expanding the tax base will be additional revenues available for government services and projects with minimal impacts to the bearers of the taxes"?

A What does that mean?

Q Yes.

A Just means that there's a tax base on the reservation, that if you enact tax, certain taxes, you can expand the tax program and tax revenues coming in, keeping in mind that you always have to be cognizant of who has to pay those taxes and just a general—this is a statement that the tax

commission acknowledges, that there's both sides to any tax proposal.

Q Okay. Well, I guess the part here that I don't understand, I understand that this—well, let me ask you if I'm correct in my understanding. My understanding is that the purpose of the hotel occupancy tax at least was to have a minimal impact on Navajo businesses, Navajo enterprises, and Navajo residents; is that correct?

[22] A Correct.

Q Why, but why did then you say with minimal impacts to the bearer of the taxes, Navajo businesses, Navajo enterprises, Navajo residents? Wouldn't the bearer of the taxes be the guests at the hotels?

A Right.

Q Okay. And that's what I don't understand is why you said the bearer of the taxes would be Navajo businesses, Navajo enterprises, and Navajo residents?

A Well, I don't understand your question. Say it again.

Q Okay. What I don't understand is why you characterize the bearer of the taxes as Navajo businesses, Navajo enterprises, and Navajo residents, if it's the lodgers that are going to pay the tax.

A Right. And this statement here acknowledges that we're trying to minimize and/or not tax the general Navajo business, the general Navajo enterprise, and the general Navajo resident.

Q Okay. Now, is part of this resolution, my understanding is that the expansion of the business activity tax was also proposed to the tribal commission; is that correct?

A The Navajo Tax Commission, yes.

Q Right. And do you know why that, why the business [23] activity tax was not adopted by the tribal council?

A It wasn't presented to the council.

Q Okay. I thought this is the resolution basically presented to the council.

A No, this one was presented to the Economic Development Committee.

Q Why did the Economic Development Committee reject it, then?

A I don't recall clearly, but I believe something to the effect that there's still concern as to having a business activity tax and a Navajo guaranteed minimum rental payment on their business site lease, and those two issues were prevailing at that time, and that more study needed to be done on it. I vaguely remember that.

Q Okay. The Economic Development Committee in their deliberations, were minutes kept or was a record kept?

A I guess according to Navajo law, yes, it should be.

Q Okay. Would the deliberations of the Navajo council also be kept when they adopted the hotel occupancy tax?

A Should.

* * *

[24]

* * *

(Exhibit 22 was marked for identification.)

Q (By Mr. Darling) Okay. Do you have a copy of this with you? It's marked as Exhibit 22. It's a resolution of the Navajo Nation Council.

A Yes.

Q Okay. Could you look on your copy of it while I ask you questions?

A Okay.

Q Was this the official enactment by the Navajo Tribal Council, Navajo Nation Council, adopting the hotel occupancy tax?

A Yes.

Q What is the significance of the note in the upper right-hand corner that says "Class `C' Resolution, no BIA action required"?

A I don't know.

Q Okay. Look at paragraph 14.

A Uh-huh.

Q After looking at that, do you recall any other reasons why the business activity tax was tabled for further study?

A Well, I think it's just like I said, there was—the businesses feel that the guaranteed minimum rentalpayment is a tax as well and that the BAT if it also [25] continued would be another tax, and more clarification needed to be provided to the committee as to what that means, and determine whether or not it's a feasible and less disruptive tax for the Navajo Nation.

* * *

[33]

* * *

Q Okay. Now, let's look specifically at the impact [34] of the tax on hotel operation. First, Section 706 requires the hotel to collect the tax; is that correct?

A That's correct.

Q Why did you refer to it as a branch instead of a hotel?

A I guess it was a matter of semantics because the other tax laws don't say business whatever or—but they say branch.

(A discussion was held off the record.)

(A recess was taken.)

Q (By Mr. Darling) Okay. Now, in addition to requiring the hotel or the branch to collect the tax, the hotel also has to file a return reporting the amount of the tax; is that correct?

A That's correct.

Q Okay. And the branch also has to then pay over the tax that's reflected on the return; is that correct?

A That's correct.

Q Okay. Now, the commission under the tax act, the commission has the right to assess the branch for any deficiencies, interest, penalty and cost; is that correct?

A That's correct.

Q Okay. And any taxes assessed become the liability of the branch; is that correct?

Do you want to refer to this? This is in Section [35] 706.

A Yes, it does.

Q 5—

A Yes, It does become a liability, Section 706(5).

Q Now, isn't it also correct that the Navajo tax code says, or the hotel occupancy tax says that, "If the branch is an association, joint venture, or partnership, or a part thereof, then all associates, participants, or partners both general and limited, shall be jointly and severally liable for the taxes"?

For the court reporter could you make an audible response, please?

A Yes, that's correct.

Q What is the authority of the Navajo Nation to assess a liability on a limited partner, for instance, a limited partner of a limited partnership?

A The authority, I guess, is the Navajo Nation's ability to impose its taxes.

Q Does the Navajo Nation have a statute regulating limited partnerships on the reservation?

A I don't think so.

Q Okay. Do you understand that under state law a limited partnership is not libel for the debts of a limited partnership beyond the amount of his contribution to the limited partnership?

[36] A We're in Navajo Nation, so you follow Navajo Nation law.

Q Okay. Does Navajo Nation law deal at all with limited partnerships?

A I don't know.

Q Okay. Do you claim that Navajo Nation law would apply to a business association between nonmembers that was operating on fee land?

A Navajo Nation law says right here that it applies to whatever you are saying there.

Q All right. Now, that section goes on to say, "Subject to alteration by agreement between them, any associate, participant, or partner shall have a right of contribution from any other associate, participant, or partner for its proportional share of taxes paid, and shall have a lien on the interest of any such other for said taxes paid." Now, by what authority does the Navajo Nation have the right to impose a lien on a partner's interests in a partnership?

A Ask that question again, please.

Q Yes. By what authority does the Navajo Nation have the right to impose a lien on a partnership interest?

A I guess by Navajo Nation being a government, an Indian government.

Q Okay. Are you saying that you have the right to [37] regulate the relationship between nonmembers, business relationship between nonmembers of a business being operated on fee land?

A The Navajo Nation and its laws apply to all of the activities within the exterior boundaries of Navajo land, Navajo reservation.

Q So you are saying that the Navajo Nation does have the right to regulate the relationships, the business relationships between nonmembers on fee land?

A I am saying that the Navajo Nation has a right to govern its activities within the exterior boundaries of the reservation.

Q Okay. And I understand that statement, but I'm trying to find out now how far you think that reaches and I'm saying if you have got two nonmembers—

A Right.

Q —who form a partnership between them—

A Right.

Q —and they form that partnership between them pursuant to Arizona law, and the partnership operates a business on fee land but within the exterior boundaries of the

reservation, I'm saying, do you contend that the Navajo Nation has the right to regulate that relationship?

A I don't contend. I think Navajo Nation as a body, government body, contend that anything, any governmental [38] activity, business activity within the exterior boundaries of the reservation is subject to Navajo law.

Q Okay. Is it correct that Section 710 requires each branch or each hotel to keep records regarding the room receipts and taxes collected?

A That's correct.

Q Okay.

Q Could you look at Section 710(b), please? What exactly does that mean?

A It means that in the case of a corporation where maybe you have a consolidated accounting system and that everything is all put together at a place that's off the reservation, that the reservation enterprise, the reservation-based hotel must keep its own record.

Q Does that mean the record regarding the room receipts and taxes collected?

A Yes. Anything on the record keeper, right.

Q Okay. Is a hotel required to keep any record pursuant to this other than or beyond room receipts and taxes collected?

A They may, yes. If there's another type of return or something that the tribe requires.

Q Okay. But unless there's some other type of return that the tribe requires, the only thing they need to keep is room receipts and taxes collected; is that correct?

[39] A Right. For the administration of the hotel, yes.

Q Okay. Is it correct that Section 712, imposes penalties on the hotel for failure to file the tax returns?

A That's correct.

Q Okay. And there's penalties and interest imposed on the hotel for failing to pay the amount of the tax by the time it's due; is that correct?

A That's correct.

Q Okay. And there's also a penalty for attempting to evade or defeat the tax; is that correct?

A Yes.

Q Okay. Now, under Section 716, which states that "Any branch or other person obligated to pay taxes pursuant to this chapter, to designate an individual, to file a return, to provide information or documents or allow access to equipment within its possession or control, to furnish a surety bond"—I assume that's "or other security, or to comply with a lawful order of the Commission, and failing to do the same in accordance with the provisions of this chapter and the regulations, may have its rights to engage in productive activity within all or some of the Navajo Nation suspended." What exactly, what procedure would be used to suspend the right to engage in productive activity?

A I don't believe we had a case.

Q What did you have in mind when this was put in the [40] act?

A That if they don't pay their taxes, then the Navajo Tax Commission will have to engage in activities to see that they not operate until such time that taxes are paid.

Q Okay. And what enforcement tools do you have to enforce this provision?

A We have never had a case when I was there.

Q Okay. Yes. But my question was, you know, what tools do you know of that are available to enforce this?

A Applying or imposing a lien. That's probably imposing a lien.

Q And how would imposing a lien suspend the right to do business or to engage in productive activity?

A Well, it's just put on the record that there's a tax assessment due.

Q Okay. Does the commission have the authority to issue orders to taxpayers?

A Yes.

Q And how are those orders enforced?

A We have never had a case, but we use the Navajo Law Enforcement.

Q Okay. So you know, if you entered an order to suspend a right to engage in productive activity you are saying that you could send the Navajo Nation Police out to enforce that order; is that correct?

[41] A That's correct.

* * *

[49]

* * *

Q Okay. What is the relationship between the Navajo Nation and a guest at a hotel within the exterior boundaries of the reservation that gives the Navajo Nation the authority to levy that tax on the guest?

A What is the relationship?

Q Yes.

A I would suppose it's because they are within the boundaries of the Navajo reservation.

[50] Q Okay. Is there any other basis for levying the tax?

A That is the tax, to impose the tax on this person in a hotel.

Q Right.

A Right.

Q Okay. Is there any other basis for levying the tax on that person at a hotel, other than the fact that he is within the exterior boundaries of the reservation?

A I guess that is the basis, that you are within the exterior boundaries of the reservation. It's just like if you go to Albuquerque you are in the boundaries of that jurisdiction, so you are subject to those taxes.

Q Okay. But if you go to the Indian Pueblo Cultural Center in the middle of Albuquerque you don't pay the taxes.

A Yes, because they probably don't have taxes.

Q Right.

A The pueblo.

Q The pueblo. Okay. But you are in the middle of Albuquerque when you are there and you don't pay Albuquerque taxes?

A But you are getting into the area of tribal Indian law and there's a separate area dealing with that, you know.

Q And that's what we're in. We're right in the middle of Indian law?

[51] A Right.

Q And is there any other basis that you are aware of—I understand what you are saying about you contend that because the person comes within the exterior boundaries of the reservation that you have the right to tax that person for renting a room?

A Correct.

Q Even if the room is located on fee land and is rented from a nonmember. Is that correct?

A The tax is imposed on the lodger using a room within the exterior boundaries of the reservation.

Q That's true even if the room is owned and rented to him by a nonmember?

A That's irrelevant. The hotel is within the exterior boundaries of the reservation.

Q Okay. A lot of times there's, you know, more than one basis for doing something, and what I'm asking—I understand that. I'm asking if there's any other basis that you know of for imposing the tax.

A The Navajo Nation laws extends to all activities within the exterior boundaries of the reservation and that's all that the tax commission needs to operate under.

Q Okay. Are you familiar with the case called United States versus Montana?

A No.

OFFICE OF THE
NAVAJO TAX COMMISSION

TAX EDUCATION CAMPAIGN
FOR THE
NAVAJO PUBLIC

Derrick B. Watchman
Executive Director

OUTLINE
TAX EDUCATION CAMPAIGN FOR THE NAVAJO PUBLIC

I. HISTORY OF THE NAVAJO TAX COMMISSION

1. Establishment
2. Current Taxes
   a. Possessory Interest Tax
   b. Business Activity Tax
   c. Oil & Gas Severance Tax

II. NAVAJO FISCAL STRUCTURE

1. Collection of Revenues
2. Process of Revenues and Collections

III. DECLINING RESOURCE BASE

1. Natural Resources—Declining
2. Navajo Population—Increasing
3. Navajo Revenues—Declining

IV. SOCIOECONOMIC IMPACT AND MAGNITUDE NEEDS

1. Unemployment
2. Education
   etc.
3. Navajo economy supports border towns

V. APPROACH TO TAXATION

1. Development of a Comprehensive Navajo Tax Program
   a. Proposed Comprehensive Finance Act 1992
2. New Proposed Tax Laws
   a. General Property Tax
   b. Gross Receipts Tax
   c. Payroll Tax

d. Lodging Tax

3. Federal Tax Incentives
4. Other Taxable Areas
5. Local Assessment and Use

Presently, the Navajo Tax Commission administers and enforces three different tax laws:

CURRENT TAXES

	RATE
PIT	3%
BAT	5%
SEV	4%

Illustration #1 (Current three tax laws)

1. Possessory Interest Tax (PIT) - CJA-13-78
   A tax on the property rights under a lease granted by the Navajo Nation, including the right to the lease surface and underlying natural resources.

2. Business Activity Tax (BAT) - CAP-36-78
   A tax on the building, altering, repairing, or demolishing in the ordinary course of business construction.

3. Oil & Gas Severance Tax (SEV) - CO-79-85
   A tax on the severing, production, or removal of oil and gas from the soil in any manner whatsoever.

In 1985, the Navajo Tribal Council amended the Business Activity Tax law to include Construction Activity.

These are the three kinds of tax laws which have been passed by the Navajo Tribal Council. Currently, we have more than 740 taxpayers in all three categories on our tax rolls and we believe there are more which will be added.

The five membered Navajo Tax Commission is assisted by the office of the Navajo Tax Commission, with a staff

of 16 employees. Three Attorneys from the Navajo Nation Department of Justice are assigned full-time to work with the tax program.

Finally, taxpayers have the right to appeal tax assessments should they disagree. The tax law and regulations provide for this. If a taxpayer disagrees with their assessments, he can appeal to the Office of the Navajo Tax Commission to discuss his concerns. This appeals process ensures the taxpayer a fair and equitable tax hearing.

JAN 11 2001

No. 00-454

(12)

Supreme Court, U.S.
FILED
JAN 11 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER

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49 pp

QUESTION PRESENTED

Whether an Indian Tribe may tax a transaction occurring between two non-Indians on fee land within the reservation?

LIST OF PARTIES TO THE PROCEEDING

The following are parties to the proceeding before this Court:

Atkinson Trading Company, Petitioner.

Joe Shirley, Jr., as Member of the Navajo Tax Commission, Respondent.

Victor Joe, as Member of the Navajo Tax Commission, Respondent.

Derrick B. Watchman, as Member of the Navajo Tax Commission, Respondent.

Elroy Drake, as Member of the Navajo Tax Commission, Respondent.

Steven C. Begay, as Executive Director of the Navajo Tax Commission, Respondent.

RULE 29.6 STATEMENT

Petitioner Atkinson Trading Company is a privately owned corporation. It has no parent corporation and no publicly held company owns any stock in the petitioner.

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OPINIONS BELOW

The opinion of the court of appeals in *Atkinson Trading Co. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000), is reprinted in the Appendix to the Petition at 1a-51a ("Pet. App."). The court of appeals' unpublished order denying Atkinson Trading Company's petition for rehearing and rehearing *en banc* by an equally divided vote is reprinted at Pet. App. 52a. The unreported opinion and order of the United States District Court for the District of New Mexico in *Atkinson Trading Co. v. Gorman*, Civ. No. 97-1261 BB/LFDG (D.N.M. Aug. 21, 1998), are reprinted at Pet. App. 53a-69a. The opinion of the Navajo Supreme Court (Pet. App. 70a-90a) is unreported. The opinion and order of the Navajo Tax Commission (Pet. App. 91a-101a) are unreported.

JURISDICTION

The opinion of the court of appeals was issued on May 2, 2000. In an order dated June 26, 2000, the court of appeals denied Atkinson Trading Company's timely petition for rehearing or rehearing *en banc*. Atkinson Trading Company filed a timely petition for writ of *certiorari* on September 22, 2000. This Court's jurisdiction to decide this case arises under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The Navajo Hotel Occupancy Tax, Title 24, Navajo Tribal Code §§ 101-142 (eff. Jan. 1, 1993), is reproduced in its entirety in the Appendix to the Petition. *See* Pet. App. 102a-124a.

STATEMENT OF THE CASE

Petitioner Atkinson Trading Company, Inc. ("Atkinson Trading") is a non-Indian corporation operating a hotel on its own fee land within the Navajo Indian Reservation (the

"Reservation").[1] Petitioner challenges the authority of respondents, various officials of the Navajo Nation (the "Tribe"), to tax transactions occurring wholly between non-Indians on that fee land. Specifically, the Navajo Nation seeks to impose a hotel occupancy tax on Atkinson Trading's overnight guests, who are not members of the Tribe. The courts below upheld the tax, despite the fact that the hotel's guests have no commercial relationship with the Tribe.

I. STATEMENT OF FACTS

A. Cameron Trading Post

The Navajo Nation is a federally-recognized Indian tribe with a large reservation spanning parts of Arizona, New Mexico and Utah. Pet. App. 96a. Atkinson Trading is a New Mexico corporation principally owned by Edwin J. Atkinson, a non-Indian. *See* Pet. App. 95a. Atkinson Trading owns and operates Cameron Trading Post (the "Trading Post"), a hotel and tourist business located near Cameron, Arizona, within the exterior boundaries of the Reservation. Pet. App. 96a.

The Trading Post is located in north central Arizona, about 50 miles from the entrance to Grand Canyon National Park. Joint Appendix 22 ("J.A."). It is adjacent to U.S. Highway 89, about a mile from the intersection with Arizona Highway 64, which leads to the park entrance. J.A. 20-21. The Trading Post consists of a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. Pet. App. 56a. Atkinson Trading's "businesses on the property are focused on the tourist market and deal almost exclusively with non-members of the Navajo Nation, who are primarily attracted to

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[1] As used throughout this brief, "fee land" has the same definition previously ascribed to it by this Court: "The term 'non-Indian fee lands' . . . refers to reservation land acquired in fee simple by non-Indian owners." *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (citation omitted).

the property because of its proximity to the Grand Canyon." Pet. App. 96a. A significant portion of its hotel business is provided by tour buses that stop overnight either before or after visiting the Grand Canyon. Pet. App. 57a.

Atkinson Trading owns the property underlying the hotel in fee simple. Pet. App. 96a. Atkinson Trading's title to the property is directly traceable to a fee patent issued by the United States. J.A. 20. At the time that the patent was issued, the property was not located within the Navajo Reservation. Nor was the property located within the Reservation when the Trading Post was opened in 1916. *See* J.A. 21. Subsequently, however, the external boundaries of the Reservation were defined in 1934 federal legislation, *see* Act of Congress of June 14, 1934, ch. 521, 48 Stat. 960-62; the Reservation now completely surrounds Atkinson Trading's fee land. *See* Pet. App. 96a. The 1934 legislation also provided: "All valid rights and claims initiated under the public land laws prior to the approval hereof involving any lands within the areas so defined, shall not be affected by this Act." 48 Stat. at 961.

Neither Atkinson Trading nor any of its non-Indian guests have any express agreements with the Tribe. *See* Pet. App. 65a. Atkinson Trading purchases electric, gas and telephone services for the Trading Post from non-Indian businesses. Pet. App. 93a. "[I]t uses water under a permit from the state of Arizona and . . . it has contracted with a non-Navajo company for the disposal of its solid waste." *Id.* At the time of the Navajo Tax Commission hearing, Atkinson Trading's only business with individual tribal members consisted of the employment of Indian workers at the Trading Post, "a small amount of sales to members and a small amount of purchases of arts and crafts." Pet. App. 96a. However, Atkinson Trading has not made any purchases of arts and crafts from tribal members since 1995. *Id.*

The highways used by Atkinson Trading's guests to reach the Trading Post are jointly patrolled by Arizona state police and Navajo tribal police. Pet. App. 57a. Fire protection in the area of the Trading Post is also jointly provided by the fire departments of local Arizona townships, the Bureau of Indian Affairs and the tribal fire department, which is located about 25 miles from the Trading Post. Pet. App. 57a-58a. There has been one small fire at the Trading Post, which was contained by employees of the Trading Post, but which led to subsequent responses by both state and tribal fire departments. *See* Pet. App. 57a-58a; J.A. 49. Emergency medical services in the Cameron area are provided by both the tribal Emergency Medical Services Department and by state emergency services in Flagstaff, Arizona. Pet. App. 57a-58a. When the Tribe provides such emergency medical services to nonmembers, it often receives reimbursement at a rate designed to cover its costs of providing those services. J.A. 127-29; 134-35. There is no evidence in the record that tribal Emergency Medical Services have ever responded to a call at the Trading Post.

B. The Tribal Hotel Occupancy Tax

Prior to the adoption of the tribal tax at issue in this case, the Navajo Nation collected only three taxes: a "Possessory Interest Tax" on property rights under a Navajo Nation lease; a "Business Activity Tax" on large producers of goods and services and certain construction activity within the Navajo Nation; and an "Oil & Gas Severance Tax" on the removal of oil and gas from reservation lands. *See* J.A. 161. There were no taxes (such as income, sales or property taxes) imposed by the tribe on its individual members. J.A. 144.

In the early 1990s, the Navajo Nation sought to expand its revenues from taxation. According to Derrick Watchman, who served as Executive Director of the Navajo Tax Commission at that time, the Commission studied several

types of new taxes, including an income tax, a gasoline tax, a possible expansion of the Business Activities Tax and the current tax at issue—the Hotel Occupancy Tax ("HOT"). J.A. 141-42. Only the HOT was presented by the Navajo Tax Commission ("NTC") to the Navajo Nation Council for legislative consideration because "it was felt that the hotel occupancy tax was one that we could get through and have the council adopt with less controversy . . . ." J.A. 142-43. The HOT was described by Mr. Watchman as "the best" of the taxes under consideration at "lessen[ing] the tax burden on [our] residents, [our] taxpayers, and transfer[ing] that tax to a transient type of consumer." J.A. 143. The tax was designed to "bring in revenue [but] not have such a high impact to Navajo residents." J.A. 145; *see also* J.A. 143 (HOT would have "the least resistance.").

The Navajo Nation Council enacted the Hotel Occupancy Tax on July 30, 1992. *See* 24 Navajo Tribal Code §§ 101-142 (eff. Jan. 1, 1993) (Pet. App. 102a-124a). Under the express terms of the HOT statute, "[a] tax is imposed on a person who . . . pays for the use or possession or for the right to the use or possession of a room or a space in a hotel costing $2 or more each day." *Id.* § 102 (Pet. App. 103a). The HOT rate was initially set at five percent of the price of the room but was increased to eight percent as of January 1, 1994. *Id.* § 103 (Pet. App. 103a). The Navajo Tax Commission interprets the HOT to apply to "guests at all hotels within the exterior boundaries of the Navajo Nation without regard to whether it is located on trust or fee land." Pet. App. 98a.

The tribal code "requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission, file reports on the tax with the Navajo Tax Commission and pay penalties and interest for failure to do so." Pet. App. 98a; *see* 24 Navajo Tribal Code §§ 104, 107, 111-15 (Pet. App. 103a, 104a, 106a-108a). Additionally, any business that fails to

comply with its obligations to collect and pay the HOT "may have its rights to engage in productive activity within all or some of the Navajo Nation suspended . . . ." 24 Navajo Tribal Code § 117 (Pet. App. 109a).

Since its enactment, the Navajo Nation HOT has been applied to room rentals by non-Indian guests at the Trading Post, notwithstanding the fact that those room rentals are subject to similar taxes by the State of Arizona. Atkinson Trading is also required to pay a 5.5% "transient lodging" tax on the gross proceeds from the operation of its lodging facilities within the State. *See* Ariz. Rev. Stat. Ann. §§ 42-5008(A), 42-5010(A)(2), 42-5070 (Supp. 2000).

II. PROCEDURAL HISTORY

In 1993, Atkinson Trading filed a complaint against the Tribe seeking a declaratory judgment that the Tribe lacked the authority to impose the HOT on the hotel's overnight guests. The United States District Court for the District of New Mexico dismissed the complaint without prejudice, concluding that Atkinson Trading was required to exhaust its tribal remedies. *See Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506 (D.N.M. 1994).

Atkinson Trading then filed an administrative challenge to the HOT before the NTC, contending that its guests were not subject to tribal authority under the general rule of *Montana v. United States*, 450 U.S. 544 (1981), because they were nonmembers on fee land. It argued that *Montana* and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), established a general presumption against the exercise of tribal civil jurisdiction over nonmembers on reservation fee land. It also argued that the HOT did not satisfy either of the two exceptions set forth in *Montana*.

After an administrative hearing, the NTC issued findings of fact and conclusions of law, upholding the tax as applied to non-Indian guests at the hotel. *See* Pet. App. 95a-100a. The

NTC concluded that, under this Court's decision in *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130 (1982), "the Navajo Nation, in exercising its right of territorial management, has the power to assess a tax on non-Indians within its jurisdiction; i.e., within the exterior boundaries of the Navajo Nation." Pet. App. 94a. The NTC rejected Atkinson Trading's argument that *Montana* governs all questions of tribal authority over non-Indian conduct on reservation fee land, concluding that *Montana* "does not serve to limit this general power to tax which was recognized in *Merrion*." Pet. App. 94a. Atkinson Trading appealed that decision to the Navajo Supreme Court, which affirmed the NTC's decision. Pet. App. 70a-90a.

After exhausting its tribal remedies, Atkinson Trading filed a renewed complaint for declaratory relief in federal district court, invoking federal question jurisdiction under 28 U.S.C. § 1331 (1994). On cross motions for summary judgment, the district court affirmed the application of the HOT to petitioner's non-Indian guests. Pet. App. 53a-68a.[2] The court reasoned that "the consensual-relationships test of *Montana* and *Strate* is the proper framework within which to analyze this taxation case." Pet. App. 63a. However, it asserted that the "*Merrion* provision-of-services or benefits-of-a-civilized-society factors . . . are relevant to the *Montana* test because they are indicators that the necessary consensual relationship is present . . . ." Pet. App. 64a.

The court therefore crafted an entirely new standard for determining tribal tax authority over nonmembers:

> The Court's review of case law concerning tribal jurisdiction over nonmembers indicates that the extent to which a tribe will be allowed to regulate or affect non-

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[2] The district court's decision was based upon its consideration of the entire record before the Navajo Supreme Court, as certified to it by that court. *See* J.A. 12-13.

> Indian activity is often determined on a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction.

Pet. App. 64a. The district court acknowledged that "[n]o explicit consensual relationship was created between the Tribe and the guests . . . ." Pet. App. 65a. Nevertheless, it held that, under its balancing test, "where Plaintiff's customers travel onto the reservation, stay overnight, and take advantage of the establishment of a civilized society there, that is consensual activity." *Id.* The court reasoned that "the guests voluntarily put themselves in the position of possibly needing assistance from tribal personnel," including tribal EMS personnel, police officers and fire officials. Pet. App. 66a. On the other side of the balance, the court concluded that the "burdens imposed by the Tribe on the nonmember guests . . . are minimal" because "the HOT involves only the payment of a tax of 8% of the room rate." Pet. App. 67a.

On appeal, a divided panel of the Tenth Circuit affirmed. Pet. App. 1a-51a. Writing for the majority, Judge McKay adopted the rationale of the district court. First, the court rejected petitioner's argument that the nature of the land within the reservation determined the applicable rule. While recognizing that this Court's decisions "did make an issue of the fee status of the land in question," the majority opined that petitioner's "reading of Supreme Court case law derives from an unwarranted reliance on a coincidence of facts and results . . . ." Pet. App. 15a-16a. In its view, "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." Pet. App. 11a. The court held that *Montana* and *Strate* are "more accurately explained as instances in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations." Pet. App. 17a. The majority

opinion therefore expressly adopted the district court's balancing test. Pet. App. 25a-26a.

The majority then applied this balancing test to find an "implied" consensual relationship between petitioner's guests and the Tribe, based upon the guests' acceptance of "the privilege of remaining on the reservation under the protection and accommodation of the services provided by the tribe." Pet. App. 29a. The "consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability" for the HOT. *Id.* The majority also agreed with the district court that the burden imposed by the tax was not disproportionate to the benefits received from the Tribe. Pet. App. 30a-31a. Thus, it upheld the Tribe's power to tax petitioner's guests.

Judge Briscoe dissented. "[I]t is clear," she reasoned, "that the analytical framework outlined in *Montana* . . . and reaffirmed in *Strate* . . . is the proper one to apply." Pet. App. 36a-37a. Judge Briscoe criticized the majority opinion for giving mere lip service to the *Montana* analysis: "Although the majority purports to apply the *Montana* framework, it makes several major missteps in doing so." Pet. App. 37a. First, "the majority mistakenly concludes it is irrelevant whether the nonmembers' conduct takes place on tribal land or non-Indian fee land . . . . A proper reading of *Montana* and *Strate* indicates this distinction is, in fact, significant." *Id.*

Judge Briscoe further criticized the majority's reliance on *Merrion* to establish its balancing test. "In my view, it is improper to modify the *Montana* framework with any language or 'factors' derived from *Merrion*." Pet. App. 41a. She explained the two separate lines of cases:

> *Montana* operates from a presumption that, absent express authority derived from a treaty or statute, a tribe lacks jurisdiction over nonmembers' conduct on nonmember fee land . . . . In contrast, *Merrion* operates

> from a presumption that a tribe retains inherent sovereign authority to regulate nonmembers' conduct occurring on tribal land, and thus contains no particular 'test' or 'factors' for deciding tribal jurisdiction.

Pet. App. 41a. The "majority's newly adopted test," Judge Briscoe reasoned, "subverts the question of whether a consensual relationship exists between the nonmembers and the tribe and replaces it with an entirely different inquiry that, in my view, makes it substantially easier for a tribe to establish jurisdiction over a nonmember." Pet. App. 41a-42a.

When properly applied, Judge Briscoe concluded, the *Montana* test invalidates the tax at issue. The first exception to the *Montana* rule, that of "consensual relationships," was not met. With respect to the majority's "implied consent" rationale, Judge Briscoe concluded that "there is no evidence that any of [Atkinson Trading's] non-Indian guests have been provided medical, health protection, or tourism services by the Nation." Pet. App. 47a-48a (footnotes omitted). With respect to *Montana*'s second exception, Judge Briscoe found no "evidence demonstrating that the conduct, or even the mere presence, of [Atkinson Trading's] non-Indian guests represents a threat to, or has a direct effect on, the [Navajo] Nation's political integrity, economic security, or health and welfare." Pet. App. 50a.

Atkinson Trading filed a timely petition for rehearing or rehearing *en banc*. In an order dated June 26, 2000, the original panel denied the petition for rehearing. By a five-to-five vote, the Tenth Circuit denied the petition for rehearing *en banc*. Pet. App. 52a.

SUMMARY OF ARGUMENT

This case raises the question of whether a tribe can tax a transaction occurring wholly between nonmembers on non-Indian fee land. As a result of evolving federal policies, such lands are now commonplace in America's Indian

reservations. However, the nonmembers who own those lands cannot participate in tribal government. In view of the serious issues that arise when governmental authority is extended over those who are excluded from participation, *see, e.g., Duro v. Reina*, 495 U.S. 676, 694 (1990), this Court has developed an integrated set of rules to determine the scope of tribal civil authority over nonmember conduct on fee land within the reservation. *See, e.g., Montana v. United States*, 450 U.S. 544; *Strate v. A-1 Contractors*, 520 U.S. 438. Under those rules, a tribe cannot tax a transaction wholly between nonmembers on fee land.

This Court's decisions establish two broad principles that apply in determining the proper scope of tribal authority over nonmembers. First, by virtue of their status as dependent sovereigns of the United States, Indian tribes generally have been divested of their authority to determine their external relationships. Thus, they generally cannot exercise their sovereign authority over nonmembers of the tribes. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 326 (1978); *Montana*, 450 U.S. at 564. Second, the scope of a tribe's power over nonmember conduct depends upon the nature of the land on which that conduct takes place. Where nonmember conduct occurs on tribal lands, a tribe has broad civil authority to regulate the conduct. Where, however, it occurs on non-Indian fee land, tribal powers are strictly limited: "[A]bsent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation . . . ." *Strate*, 520 U.S. at 446.

This Court's general presumption against tribal authority over non-Indian conduct on fee land extends to *all* tribal civil authority—whether related to regulation, adjudication, or taxation. *See Strate*, 520 U.S. at 453 ("While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of 'inherent sovereignty.'"). However,

the general rule is tempered by two narrowly drawn exceptions—the first permitting the exercise of tribal authority where a nonmember has entered into a consensual relationship with the tribe or its members; and the second designed to protect threats to tribal self-government arising from the non-Indian conduct sought to be regulated. *See Montana*, 450 U.S. at 565-66; *Strate*, 520 U.S. at 446.

The Tenth Circuit majority, however, fashioned a different rule through mistaken reliance upon two prior decisions of this Court—*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Neither case involved nonmember conduct on fee land; rather, both involved tribal taxation of nonmember conduct on tribal trust lands. Thus, both decisions fall outside the ambit of *Montana*'s general rule. Moreover, both cases involved transactions by the nonmembers *with the tribe itself*. Thus, even if viewed through the prism of *Montana*, both decisions can be understood as applications of *Montana*'s first exception for consensual relationships by nonmembers with the tribe. *See Montana*, 450 U.S. at 565-66 (citing *Colville* as an illustration of *Montana*'s first exception).

The Tenth Circuit also drew support for its contrived "balancing" test from two other inapposite sources. First, it relied upon the definition of "Indian country" in 18 U.S.C. § 1151 (1994). That statute, however, did not affect the outcome in either *Montana* or *Strate*, even though the nonmember conduct in both cases took place on land falling within the statutory definition of "Indian country." *See Montana*, 450 U.S. at 562; *Strate*, 520 U.S. at 454 n.9. Second, the Tenth Circuit quoted language from a nearly century-old circuit court decision, *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), to suggest that a tribe has expansive authority to tax nonmembers. The cited language from *Buster*, however, is inconsistent with modern Indian jurisprudence found in

Montana and its progeny. Moreover, *Buster* arose under unique circumstances involving congressional and presidential authorization of the taxes at issue in that dispute. It is therefore not relevant here.

Properly applied, *Montana* and *Strate* invalidate the application of the Navajo HOT to Atkinson Trading's non-Indian guests. There is no dispute in the record that Atkinson Trading, a non-Indian company, owns the land underlying the Trading Post in fee. Nor is there any plausible argument that Congress has expressly authorized the Navajo Nation to apply its hotel occupancy tax to nonmembers. Thus, if the tax is to survive, it must pass muster under one of the two *Montana* exceptions.

The Navajo HOT is not supported by *Montana*'s first exception for "consensual relationships" between the nonmembers subject to the tax and the Navajo Nation. As the district court properly found, "[n]o explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." Pet. App. 65a. Nor does the Navajo Nation HOT arise from any express consensual relationship between the Navajo Nation and Atkinson Trading.

Those facts alone should have led the lower court to conclude that *Montana*'s consensual relationships exception is not implicated in this case. Nevertheless, it held that a relationship of "implied consent" exists because the Tribe provides, or potentially provides, the "benefits of a civilized society," such as police, fire and emergency services, to the hotel's guests. This "benefits" test finds no support in this Court's *Montana* jurisprudence. Indeed, this Court has repeatedly rejected a theory of "implied consent" arising from the presence of non-Indians within the confines of the reservation. *See, e.g., Duro*, 495 U.S. at 676. In both *Montana* and *Strate*, the nonmembers sought to be regulated

by the tribes could have received potential benefits from the tribes by virtue of their presence on the reservation. In fact, in *Strate*, where the nonmember conduct at issue involved an automobile accident on the reservation, the likelihood of receipt of tribal emergency services by a nonmember was much greater than in this case, where the only nonmember conduct at issue was an overnight stay in a hotel. Nevertheless, this Court there rejected entreaties by the tribal petitioners and the United States to adopt a "benefits" standard for determining consensual relationships.

Nor is *Montana*'s second exception satisfied in this case. That exception is reserved for demonstrably serious threats to tribal self-government arising from nonmember conduct. But the nonmember conduct at issue here—the renting of hotel rooms—can hardly be said to "trench unduly" on the Navajo Nation's ability to govern itself. *Strate*, 520 U.S. at 458. Overnight hotel stays do not have any greater impact on tribal self-government than the non-Indian hunting and fishing at issue in *Montana* or the reckless driving at issue in *Strate*—neither of which was deemed sufficient to implicate *Montana*'s self-government exception. Indeed, it is difficult to see how "self-government" is implicated at all by a tribal tax which falls almost entirely on transient nonmembers.

Thus, under the well-established framework of *Montana* and *Strate*, the Navajo Nation has no authority to tax a nonmember guest's rental of a hotel room at the Cameron Trading Post—a transaction wholly between nonmembers on fee land.

ARGUMENT

I. THE GENERAL RULE OF *MONTANA v. UNITED STATES* GOVERNS TAXATION OF NON-INDIANS ON FEE LAND

As this Court recently and unanimously stated, *Montana v. United States* is "the pathmarking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445.

Montana confirmed two key principles that govern the outcome of this case. First, it recognized "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. Second, it drew a clear demarcation between the sovereign powers of the tribe over nonmembers on tribal lands and nonmembers on fee lands. While tribal powers over nonmembers on tribal trust lands are considerable, *Montana* established a general rule that an Indian tribe lacks authority over nonmembers on non-Indian fee land, subject to two carefully limited exceptions. That general rule applies to the Navajo Nation's attempt to collect its hotel occupancy tax from non-Indians staying on Atkinson Trading's fee land.

A. By Virtue of Their Incorporation into the United States, Indian Tribes Generally Have Been Divested of Authority over Nonmembers

The general rule established in *Montana* that tribes cannot exercise sovereignty with respect to nonmembers on fee lands represents a distillation of more than a century of case law. This Court has long held that, by virtue of their incorporation into the United States, Indian tribes lack the "complete sovereignty" normally exercised by independent nations. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

Chief among the restrictions on tribal power stemming from incorporation was the loss of the tribes' sovereign authority over nonmembers: "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian

tribe and nonmembers of the tribe." *Wheeler*, 435 U.S. at 326. "[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to *determine their external relations*." *Id.* (emphasis added); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring) (incorporation of tribes within the United States limits the tribes' "right of governing every person within their limits except themselves").

This limitation stems, in part, from the closed nature of tribal government. Most tribal governments, like the Navajo Nation, are closed to participation by nonmembers of the tribe.[3] Nonmembers cannot vote in tribal elections.[4] Nor may nonmembers qualify for elected offices in tribal governments.[5] Where a tribe seeks to exercise jurisdiction over its own members, fairness is assured by the members' "right of participation in tribal government, the authority of which rests on consent." *Duro v. Reina*, 495 U.S. at 694. But where a tribe seeks to govern its relationships with nonmembers, this Court has "reject[ed] an extension of tribal authority over those who have not given the consent of the governed that

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[3] The Navajo Nation tribal code limits eligibility for membership in the Tribe to "persons of Navajo blood whose names appear on the official roll of the Navajo Nation" and any person "who is at least one-fourth degree Navajo blood." 1 Navajo Tribal Code § 701. Membership may not be obtained by any other method. *Id.* § 702(A) (no one "can ever become a Navajo, either by adoption, or otherwise, except by birth").

[4] *See* 11 Navajo Tribal Code § 281 (limiting voter eligibility to "[a]ll persons . . . enrolled on the Agency Census roll of the Bureau of Indian Affairs as members of the Navajo Nation" over age 18).

[5] *See, e.g.*, 11 Navajo Tribal Code § 8(A) (defining qualifications for Navajo President and Vice President to include "member[ship] of the Navajo Nation"); *id.* § 8(B) (requiring that each Delegate to the Navajo Nation Council "be an enrolled member of the Navajo Nation on the Agency Census roll of the Bureau of Indian Affairs").

provides a fundamental basis for power within our constitutional system." *Id.* at 694.

The inherent limitations on a tribe's authority to control its external relations have led to well-defined restrictions on tribal governance of nonmembers. In *Oliphant*, this Court held that Indian tribes lack the power to enforce their criminal laws against non-Indians, unless explicitly authorized by Congress. 435 U.S. at 210. Tribal prosecution of non-Indian offenders, the Court concluded, is "'*inconsistent with their status*'" as dependent sovereigns of the United States. *Id.* at 208 (citation omitted).[6]

The same principles led the Court in *Montana v. United States*, 450 U.S. 544, to conclude that an Indian tribe generally lacks the power to exercise its civil authority over non-Indians: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support *the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe*." *Id.* at 565 (footnote omitted) (emphasis added).

At issue in *Montana* was the Crow Tribe's attempt to regulate non-Indian hunting and fishing on its reservation. The tribe argued that it retained the power to regulate non-Indian hunting and fishing "as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation." *Id.* at 563. The Court rejected that general assertion, noting that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty."

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[6] This holding was extended to prohibit a tribe's exercise of criminal jurisdiction over nonmember Indians in *Duro v. Reina*, 495 U.S. at 688 ("In the area of criminal enforcement . . . tribal power does not extend beyond internal relations among members.").

Id. (citing *Wheeler*, 435 U.S. at 326). The Court recognized that the Crow Tribe retained sovereign powers relating to its own governance—such as "the power to punish tribal offenders, . . . to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana*, 450 U.S. at 564. However, it reasoned that tribal sovereignty extends no further than necessary to preserve that self-government: the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.*

This Court recently and unanimously reaffirmed this principle in *Strate v. A-1 Contractors*. The Court there squarely rejected the notion that a tribe could exercise inherent power over all nonmembers within reservation boundaries. "In the main . . . 'the inherent sovereign powers of an Indian tribe'—those powers a tribe enjoys apart from express provision by treaty or statute—'do not extend to the activities of nonmembers of the tribe.'" 520 U.S. at 445-46 (citation omitted). Thus, *Strate* confirms what *Montana* articulated—the general presumption that a tribe lacks civil authority over nonmembers.

B. *Montana* Strictly Limits Tribal Sovereignty over Nonmembers on Fee Lands

In light of *Montana*'s general presumption, a tribe must point to a *specific* source of power whenever it seeks to exercise authority over nonmembers. *Montana* and *Strate* identify the tribe's ownership and control of its land as a primary source of such authority. Those cases therefore sharply limit a tribe's sovereignty over nonmembers on land owned in fee by non-Indians.

In *Montana*, this Court drew a clear distinction between the power of a tribe to regulate nonmember conduct on tribal land and its power to regulate nonmember conduct on land owned

in fee by nonmembers. The Court acknowledged the terms of the treaty at issue gave the Crow Tribe "absolute and undisturbed use and occupation" of its tribal land. The treaty also "gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it . . . ." 450 U.S. at 554. Thus, the Court could "readily agree" with the conclusion of the court of appeals "that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe." *Id.* at 557. Further, the Court agreed that "if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits." *Id.*

The Court reached a different conclusion, however, with respect to reservation lands owned by nonmembers, concluding that "'inherent sovereignty' is not so broad as to support the application of [the tribal ordinance] to non-Indian lands." 450 U.S. at 563. Regulation of nonmember activity "on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations" and thus is not supported by "retained inherent sovereignty" of the tribe. *Id.* at 564-65. A tribe's authority over nonmembers "could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'" *Id.* at 559 (citation omitted).

This general rule was tempered by two exceptions. The first stems from a theory of consent by the nonmember to tribal regulation: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. *Montana*'s second exception seeks to prevent threats to tribal self-government: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the

political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Neither of the exceptions was found to be implicated by hunting and fishing on fee lands no longer owned by the tribe, but owned by non-Indians.

Subsequent cases have confirmed that, where a tribe lacks or surrenders a right to control lands within the reservation boundaries, the rule of *Montana* will apply. For example, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Court held that the Yakima tribe lacked the power to zone nonmember land in an area of the reservation in which the tribe no longer had any control over non-Indian access. *Id.* at 424 (opinion of White, J.); *id.* at 444-45 (Stevens, J., concurring in relevant part).[7]

In *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Court held that a tribe had no authority to regulate nonmember hunting and fishing on certain reservation lands acquired by the United States for a flood zone. The Court explained: "*Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands." 508 U.S. at 689. "The abrogation of this greater right . . . implies the loss of regulatory jurisdiction over the use of the land by others." *Id.* (footnote omitted). The Court concluded that, in taking the tribal trust lands under federal law, Congress "eliminated the Tribe's power to exclude non-Indians from these lands, and with that the *incidental regulatory jurisdiction* formerly enjoyed by the Tribe." *Id.* (emphasis added).

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[7] Writing for a separate majority, Justice Stevens upheld the tribe's zoning power with respect to that portion of the reservation where the tribe maintained a strict "'courtesy permit system'" for visitors, which was enforced by officers at four guard stations controlling access. *See* 492 U.S. at 439.

Most recently, in *Strate*, the Court held that *Montana*'s limitation on tribal authority over nonmembers is not confined to non-Indian fee lands, but rather extends to *all* reservation lands over which the tribe "cannot assert a landowner's right to occupy and exclude." 520 U.S. at 456. The Court held that the tribal courts could not exercise jurisdiction over a nonmember defendant for an accident occurring on a state highway running through the reservation. *Id.* at 442. The right-of-way for the highway lay on land held in trust for the tribes and their members. *Id.* at 442-43. Nevertheless, the *Strate* Court held that, because the tribes had lost their "gatekeeping right" over the highway, the federally-granted right-of-way was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id.* at 454 (footnote omitted).

Strate further confirms that *Montana*'s main rule and its two exceptions provide the governing standards for *all* exercises of tribal civil authority over nonmembers. Rejecting an argument that a different rule should apply for purposes of tribal court jurisdiction, *Strate* emphasized not only the "pathmarking" role of *Montana* but also the "general" nature of its rule. 520 U.S. at 446. "Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.'" *Id.* at 453 (citation omitted).[8]

A tribe's authority to tax nonmembers is part and parcel of the tribal civil authority covered by *Montana*'s rule. In its first exception, *Montana* explains that a "tribe may regulate,

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[8] *See also id.* at 453 ("Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'") (alteration in original) (citation omitted).

through *taxation*" activities arising out of a consensual relationship between a nonmember and the tribe or its members. 450 U.S. at 566. *Montana* cited several cases in which a tax had been upheld based upon consensual relationships with a tribe or its members.[9] By including the power to tax within its exception, *Montana* expressly contemplated that tribal taxation would be subject to its main rule with respect to nonmembers on non-Indian land.

Montana's application of a uniform standard to both tribal regulation and tribal taxation makes eminent sense. In reality, these two powers cannot easily be separated. As Chief Justice Marshall explained, the taxing power is tantamount to the ultimate regulatory power: "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). Additionally, a government's power to tax is usually meaningful only where it can be enforced through regulatory mechanisms. For example, in the HOT statute, the Tribe reserves the right to enforce Atkinson Trading's obligations by suspending "its rights to engage in productive activity within all or some of the Navajo Nation . . . ." 24 Navajo Tribal Code § 117. The HOT portion of the Navajo tax code also contains a number of other regulatory provisions, such as a recordkeeping requirement,[10] a lien creation and recording procedure,[11] and a restriction on business transfers without payment of the tax.[12] Thus, the Tribe relies heavily upon its regulatory power to enforce its tax code.

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[9] 450 U.S. at 565-66 (citing *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980)).

[10] 24 Navajo Tribal Code § 111 (Pet. App. 106a).

[11] 24 Navajo Tribal Code § 121 (Pet. App. 111a).

[12] 24 Navajo Tribal Code § 126 (Pet. App. 114a).

Accordingly, *Montana* sensibly treats *all* civil authority—regulatory, adjudicatory or fiscal—in a like manner.[13] In the absence of express congressional authorization to the contrary, an Indian tribe can neither regulate nor tax nonmember conduct on fee land unless one of the two *Montana* exceptions applies. *See Strate*, 520 U.S. at 453.

C. The Tenth Circuit Erroneously Relied on Decisions Involving Tribal Trust Lands

Though purporting to apply *Montana*, the court of appeals in this case rejected what it deemed to be "the arbitrary factual basis of fee status as the determinative factor" in the *Montana* analysis. Pet. App. 25a. "Nothing" in this Court's decisions, the panel majority reasoned, "suggested that fee status is a limitation on the power to tax." Pet. App. 16a. In fact, the majority opined that "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." Pet. App. 11a.

The majority based its conclusion on a misreading of two of this Court's decisions—*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130. Neither of those cases is applicable to this dispute. Their facts differ in two important respects from the situation here. First, the taxes applied to nonmember conduct *on tribal lands*, not fee land governed by *Montana*'s general rule. Second, they involved transactions by nonmembers *with the tribe itself*.

The panel majority cited *Colville* for the proposition that "'[f]ederal courts . . . have acknowledged tribal power to tax

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[13] Indeed, the *Montana* Court assumed that the power to impose a licensing fee on hunting and fishing would follow the same rules as other forms of regulation. *See* 450 U.S. at 557.

non-Indians entering the reservation to engage in economic activity.'" Pet. App. 18a (citations omitted) (alterations in original). That acknowledgement, however, extends only as far as the facts of *Colville* itself. There, the Court considered the power of certain Indian tribes to tax cigarette sales by those tribes at tobacco outlets on tribal lands. Two different selling and tax schemes were at issue. Under both, however, the tax was imposed on a direct purchaser of the cigarettes from the tribe.[14] In upholding the tribal taxes, the Court carefully reasoned that the tax was permissible because (1) the sales occurred on tribal trust lands; and (2) the tribes were parties to the transaction. "The power to tax transactions *occurring on trust lands* and *significantly involving a tribe* or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Colville*, 447 U.S. at 152 (emphasis added).[15]

If this language in *Colville* left any doubt about the scope of the holding there, that doubt is resolved by Justice White's later characterization of that decision in his plurality opinion in *Brendale*. Justice White, who had authored the majority opinion in *Colville*, noted that its holding extended only to tribal lands: "As the opinion in *Colville* made clear, that case

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[14] Under the first, the tribes distributed cigarettes to tobacco outlets, which would sell the cigarettes on a consigned basis to the ultimate consumer. The tribes would continue to hold title to the cigarettes until purchased by the consumer, who would pay the tax in connection with the purchase. 447 U.S. at 144. Under the second scheme, the tribe acted as a wholesaler, selling its cigarettes to licensed retailers and collecting its tax directly from those retailers. *Id.* at 144-45.

[15] Even if the sales in *Colville* had taken place on non-Indian land, the fact that the tribes themselves were parties to the transaction might have independently supported the tax under *Montana*'s first exception. *See Montana*, 450 U.S. at 565-66 (citing *Colville* as an illustration of *Montana*'s first exception).

involved '[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members.' It did not involve the regulation of fee lands, as did *Montana*." *Brendale*, 492 U.S. at 427 (White, J.) (citation omitted) (alteration in original). Thus, *Colville* has no applicability to a case such as this, where the transactions do not involve the tribe and do not take place on tribal trust lands.

For the same reasons, the lower court's reliance on *Merrion* is misplaced. In *Merrion*, the entire reservation was tribal trust land. 455 U.S. at 133. The non-Indians subject to the tax had long-term leases *with the tribe* to extract and produce oil and gas from those reservation trust lands. *Id.* This Court upheld a tribal oil and gas severance tax as it applied to activities pursuant to those leases on tribal land. 455 U.S. at 133 ("severance tax on 'any oil and natural gas severed, saved and removed *from Tribal lands*'") (emphasis added) (citation omitted). *Merrion* is therefore little more than a straightforward application of *Colville*—it is another case involving "'transactions occurring on trust lands and significantly involving a tribe or its members . . . .'" *Merrion*, 455 U.S. at 137 (citation omitted).

Merrion contains language often cited by proponents of tribal authority concerning the source of a tribe's power to tax. Specifically, *Merrion* rejected the notion that "the authority to tax derives *solely* from the power to exclude." *Id.* at 141. The majority opinion made this point, however, in response to the dissent's argument that the tribe had lost its power to tax when it granted a lease on tribal land. *See* 455 U.S. at 186 (Stevens, J., dissenting). In essence, the Court held that the tribe's power to tax nonmembers on tribal lands did not dissolve simply because the tribe had previously entered into agreements permitting particular non-Indians to enter those lands. However, the Court did not assert that the power to tax would extend beyond tribal lands or tribal transactions. The opinion nowhere suggests that the rules in

those circumstances would be any different than as stated in *Montana*.

On the contrary, *Merrion* recognizes significant limitations on a tribe's power to tax. "[T]here is a significant territorial component to tribal power." *Id.* at 142. The Court reasoned that "the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction." *Id.* The Court reasoned that a nonmember must take some affirmative step in entering tribal lands or entering into a transaction with the tribe before tribal jurisdiction attaches: "[A] tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." *Id.*[16] In *Merrion*, of course, the non-Indians had done both and thus were understandably subjected to tribal authority. In this case, by contrast, Atkinson Trading's guests do neither. They do not enter tribal trust lands, but rather, stay at a hotel on fee land located just off a federal highway right-of-way. Nor do they conduct any business with the Tribe or its members. The only transaction at issue here is one wholly involving nonmembers. Thus, the transaction sought to be taxed is fundamentally outside the area which both *Colville* and *Merrion* describe as necessary to preserve tribal sovereignty.

In *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), the Ninth Circuit properly recognized that the reach of *Colville* and *Merrion* was confined to transactions occurring on tribal lands. "While both cases contain broad language regarding tribal taxation powers, neither case abrogates *Montana*'s main rule." *Id.* at 952. *Colville*, the Ninth Circuit reasoned, "directly address[ed]

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[16] These conditions for the assertion of tribal authority over nonmembers parallel *Montana*'s holding that a tribe may regulate non-Indian conduct on tribal trust lands and its first exception for consensual relations with the tribe.

only Indian taxation power over transactions occurring on Indian land. . . ." *Id.* In the same vein, *Merrion* "did not directly address a tribe's power to tax property located on the equivalent of non-Indian fee land." *Id.*

Lacking any basis in this Court's decisions to support tribal taxation of nonmembers on fee land, the Tenth Circuit embarked on its own delineation of the source of tribal powers over nonmembers. It relied heavily on the federal statute defining "Indian country," 18 U.S.C. § 1151. The purpose of that statutory definition, however, was to define the scope of federal criminal jurisdiction.[17] No decision of this Court has ever invoked it to describe the scope of tribal powers over nonmembers on non-Indian fee land. On the contrary, this Court has applied *Montana*'s presumption against tribal authority over nonmembers even in circumstances where it was plain that the land at issue fell within Indian country for purposes of federal criminal jurisdiction. *See Montana*, 450 U.S. at 562; *Strate*, 520 U.S.

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[17] 18 U.S.C. § 1151 explains that the definition of "Indian country" is limited in its application to "this chapter"—Chapter 53 of Title 18, governing federal crimes relating to Indians:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151; *see also Strate*, 520 U.S. at 454 n.9 (describing 18 U.S.C. § 1151 as part of federal criminal law chapter).

at 454 n.9.[18] The definition of "Indian country" does not change the fundamental distinction drawn in these cases between lands over which the tribes exercise dominion and control and those owned or controlled by nonmembers. Even more fundamentally, Section 1151 fails to the meet the requirement of an express congressional authorization of power over nonmembers established by several decisions of this Court. *See Montana*, 450 U.S. at 564 (tribal jurisdiction over nonmembers "cannot survive without express congressional delegation"); *Strate*, 520 U.S. at 445 ("[A]bsent *express* authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.") (emphasis added); *Bourland*, 508 U.S. at 695 n.15.

The Tenth Circuit majority also sought support from the discussion of inherent tribal powers in a much earlier Eighth Circuit decision, *Buster v. Wright*, 135 F. 947 (8th Cir. 1905). *See* Pet. App. 14a-15a. *Buster* has been cited by this Court as one of several cases in which the exercise of tribal authority over nonmembers was permissible based on a consensual relationship with the tribe or its members. However, this Court has never endorsed all of the reasoning of that case, much of which is inconsistent with the holdings of *Montana*, *Strate* and other cases regarding the treatment of nonmembers on land over which the tribes have surrendered control.[19] To

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[18] The tribal petitioners in *Strate* argued that the definition of "Indian country" in 18 U.S.C. § 1151 supported their position that the tribe could exercise sovereignty over nonmember conduct on the right-of-way, but the Court rejected that view. *See* Brief of Petitioners at 22, *Strate v. A-1 Contractors* (No. 95-1872).

[19] *Compare, e.g., Buster*, 135 F. at 950 ("The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.") *with Montana*, 450 U.S. at 564 ("exercise of tribal power beyond what is necessary to protect tribal self-

the extent that the Tenth Circuit panel majority relied on anachronistic conceptions of tribal sovereignty in *Buster*, it "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' and is therefore *not* inherent." *Bourland*, 508 U.S. at 695 n.15 (citation omitted).

Buster is also of limited value to this dispute because it rested on specific congressional and presidential action authorizing tribal license fees. In 1900, the Creek Nation had imposed a licensing fee as a condition to entering the reservation and operating certain types of businesses. Pursuant to statute, Act of Congress of June 28, 1898, ch. 517, 30 Stat. 495, 518, the tribal ordinance was approved by the President and enforced by the Secretary of the Interior in written regulations. 135 F. at 954.[20] "Both parties knew that this power existed, and the United States, by the act of its President approving the law of the Creek national council, and the Secretary of the Interior by enforcing it, had approved its exercise." 135 F. at 954. In 1901, however, the United States entered into a new treaty with the Creeks, which provided that non-Indians could purchase their leased lots

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government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."). *Compare also Buster*, 135 F. at 951 ("[T]he jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it . . . .") *with Strate*, 520 U.S. at 453 ("[T]he civil authority of Indian tribes . . . with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'") (citation omitted).

[20] Earlier decisions had approved such fees based on the notion that the tribe could condition access to its lands upon procurement of the license. *Morris v. Hitchcock*, 194 U.S. 384, 392 (1904); *Maxey v. Wright*, 54 S.W. 807, 810-11 (Indian Territory Ct. App.) ("[T]he Creek Nation is clothed with the power to admit white men, or not, at its option, which, as we hold, gave it the right to impose conditions."), *aff'd*, 105 F. 1003 (8th Cir. 1900).

from the tribe. *Id.* at 951. The 1901 agreement prohibited the tribe from imposing certain fees (*e.g.*, a licensing fee with respect to grazing), but did not address the business license fee. *See id.* at 953-54. The *Buster* court concluded that the 1901 treaty did not deprive the Creek Nation of its previously recognized right to impose the license fees. "As the law then in force required such noncitizens to pay such taxes, as both parties were then aware of the fact and considered the question, and as they made no stipulation to abolish these taxes, the conclusive presumption is that they intended to make no such contract . . . ." *Id.* at 954. Thus, *Buster* implemented what the Court perceived to be the specific intent of the parties to the 1901 treaty. *See Montana*, 450 U.S. at 564 (the exercise of tribal sovereignty over nonmembers may be authorized by congressional action).

In this light, the court of appeals was wrong to modify the general rule fashioned in *Montana* based on the broad language of the court of appeals in *Buster* almost a century ago. *Montana*'s distinction between lands over which a tribe can exercise control and lands surrendered to the control of others has been reaffirmed in *Strate* and consistently applied in determining the limits on tribal authority over the conduct of nonmembers.[21]

Rather than adhere to the rule set forth in *Strate* and *Montana*, the Tenth Circuit here proposed its own multi-factor balancing test. It purported to weigh "(1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting to exercise, its

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[21] *See, e.g., El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (distinguishing *Strate* on ground that 'the events in question here occurred on tribal lands"); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999); *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000); *Big Horn County*, 219 F.3d 944.

interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved." Pet. App. 25a. In the panel majority's view, its "case-by-case approach," *id.* at 17a, "leaves the Supreme Court's Indian law jurisprudence more cohesive and intelligible." *Id.* at 25a. In reality, this approach leaves the courts without any definite guidelines on the scope of tribal power over nonmembers on fee land and invites continuing litigation. This vague balancing test is a tell-tale sign that the lower court has drifted far from the moorings provided by this Court's decisions. The general rule set forth in *Montana*, so recently reaffirmed in *Strate*, governs the taxation of nonmembers on fee land.

II. UNDER THE RULE OF *MONTANA* AND *STRATE*, THE NAVAJO NATION CANNOT APPLY ITS HOTEL OCCUPANCY TAX TO NONMEMBER GUESTS ON FEE LAND

Under the general rule of *Montana*, a tribe cannot exercise jurisdiction over nonmembers on fee land, unless Congress has expressly authorized tribal jurisdiction or one of two exceptions is met. Here, there is no dispute that the hotel is located on fee land. *See* Pet. App. 56a. Nor is there any express congressional authorization for this tax. Thus, in order "[t]o prevail here," as in *Strate*, the Tribe "must show that [its tax] against nonmembers qualifies under one of *Montana*'s two exceptions." 520 U.S. at 456.

Neither exception is satisfied here, any more than in *Strate*. There, this Court held that a non-Indian involved in an accident while driving a truck over a state highway on the reservation was not subject to tribal court jurisdiction. Here, the hotel's non-Indian guests traveling on a federal highway do little more than spend the night at a hotel located on fee land. This form of conduct does not constitute either a consensual relationship with the Tribe or an intrusion on tribal self-government.

A. The Navajo Hotel Occupancy Tax Is Not Authorized by *Montana*'s "Consensual Relationships" Exception

The transaction assertedly subject to tax in this case does not fall under *Montana*'s first exception for consensual commercial relationships. "The first exception to the *Montana* rule covers 'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Strate*, 520 U.S. at 456-57. Here, the district court found that Atkinson Trading's overnight guests had no such relationship with the Navajo Nation: "No explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." Pet. App. 65a. That finding should have ended the matter.

The incidence of the HOT falls on Atkinson Trading's guests, who have no conceivable relationship to the Tribe or its members. A hotel guest's overnight stay at the Trading Post is thus akin to the automobile accident at issue in *Strate*. The Navajo Nation has no connection with the transaction in question. The hotel transaction "'ar[ises] between two non-Indians,'" and is thus "distinctly non-tribal in nature." 520 U.S. at 456-57. As in *Strate*, *Montana*'s first exception cannot apply.

Even if the tax were imposed on Atkinson Trading, the Trading Post itself does not have the kind of consensual relationship necessary to support tribal jurisdiction under *Montana* and *Strate*. Although it employs some tribal members,[22] sells a small portion of its goods to tribal

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[22] Of course, federal equal employment opportunity law would prohibit the Trading Post from refusing to hire a qualified applicant for employment because that applicant was a Navajo Indian. J.A. 31.

members, and in the past had purchased some arts and crafts from tribal members, none of these relationships has any connection to the tax at issue. *Strate* requires more than a finding that a nonmember has *some* relationship with the tribe. Rather, there must be a nexus between the tribe and the *transaction sought to be regulated.* That is, to be permissible, the tribal regulation at issue must "arise out of" the consensual relationship between a nonmember and the tribe. *See, e.g., County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (*en banc*).

The facts of *Strate* illustrate this point. There, the non-Indian defendant "was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes . . . ." 520 U.S. at 457. That consensual relationship was held insufficient to support the application of the first exception because "'the [T]ribes were strangers to the accident.'" *Id.* (alteration in original) (citation omitted). Thus, while a consensual relationship was present in *Strate*, the case "present[ed] no 'consensual relationship' *of the qualifying kind.*" *Id.* (emphasis added). Similarly here, the minor relationships between Atkinson Trading and individual tribal members have no connection to the transaction sought to be taxed—overnight stays by the hotel guests. Whatever limited contacts Atkinson Trading might have with the members of the Tribe, it is undisputed that the Navajo Nation is not a party to the hotel's renting of rooms to overnight guests. *Montana*'s consensual relationship exception is inapplicable.

Lacking any express agreement on which to base a finding of a qualifying consensual relationship, the Tenth Circuit instead held that transient nonmembers staying at the Trading Post had entered into a relationship of "implied consent" with the Navajo Nation. Pet. App. 29a. The panel majority reasoned: "[T]he consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging

within the confines of the Navajo Reservation and therefore remain free from liability for the Navajo Hotel Occupancy Tax." Pet. App. 29a. It noted that "the Tribe provides [Appellant's] overnight guests with the 'benefits of a civilized society' while the guests are present, and the presence of guests creates a greater need, both actual and potential, for tribal services.'" *Id.* at 30a (citation omitted).

The concept of "benefits of a civilized society" has never served as a standard under *Montana*'s exception for consensual relationships. This language was offered in *Merrion* to explain why it was not unfair to tax nonmembers who entered into transactions *with the tribe* taking place on *tribal lands*. *See Merrion*, 455 U.S. at 133, 135-38. In that circumstance, the nonmember benefits both from the tribal role in the transaction and from the tribe's management of its own trust lands. Nowhere in *Merrion*, however, does the Court suggest that benefits provided by the tribe give rise to an implied consensual relationship irrespective of the situs of the nonmember conduct.[23]

In fact, this Court has on more than one occasion refused to adopt a theory of implied consent. For example, in *Duro*, this Court rejected the argument that a nonmember could be subjected to criminal jurisdiction if the nonmember had sufficient "contacts" with the tribe. The Court reasoned: "The contacts approach is little more than a variation of the argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him. We have rejected this approach for non-Indians." 495 U.S. at 695.

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[23] Thus, one district court that frequently deals with Indian matters has observed: "The advantages of a civilized society theory is not a jurisdictional test, but is instead simply a recognition of the source of a tribe's power to tax once jurisdiction over a nonmember has been established." *In re Haines*, 245 B.R. 401, 406 (D. Mont. 2000).

Similarly, the Court has repeatedly declined to incorporate a "benefits" standard into *Montana*'s consensual relationships inquiry. In *Montana*, it would have been arguable that fee owners hunting and fishing on their own lands benefited from tribal government. However, the Court plainly rejected that approach. Thus, Justice White observed in *Brendale* that fee owners "do not have a 'consensual relationship' with the [tribe] simply by virtue of their status as landowners within reservation boundaries, as *Montana* itself necessarily decided." 492 U.S. at 428.

Were the potential receipt of "benefits of a civilized society" sufficient to infer nonmember consent to tribal authority, *Strate* would have been the ideal case in which to apply this standard. Defendant A-1 Contractors was a construction company doing business with the tribes. 520 U.S. at 443. A-1 Contractors performed work on the land on which a tribal community building was being constructed. *A-1 Contractors v. Strate*, 76 F.3d 930, 932 (8th Cir. 1996). Defendant Stockert was the driver of a gravel truck involved in the accident. Each of the defendants arguably could have benefited from actual or potential tribal services, including emergency services. Indeed, *Strate* specifically commented on the possibility of tribal police patrolling the very state highway on which the accident occurred: "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway . . . ." 520 U.S. at 456 n.11.

Based on these facts, both the United States[24] and the tribal petitioners[25] argued in *Strate* that a consensual relationship could be based on the nonmembers' receipt or potential receipt of tribal services, such as police and emergency services. Nevertheless, the *Strate* Court did not consider the possibility of these tribal services—the very same services invoked by the Navajo Nation here—sufficient to give rise to a consensual relationship with the tribes. *See id.* at 456-57. *Strate* thus makes clear that *Merrion*'s "benefits" test has no role to play in the "consensual relationship" analysis.

What the Navajo Nation seeks in its proposed incorporation of *Merrion*'s "benefits" concept is an entirely new

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[24] The United States argued:

> A Tribe has plenary authority to regulate non-Indians who "avail themselves of the substantial privilege of carrying on business on the reservation"—who, like the Tribe's own members, "benefit from the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of a tribal government."

Brief for the United States as Amicus Curiae Supporting Petitioners at 29 (Nov. 12, 1996), *Strate v. A-1 Contractors* (No. 95-1872).

[25] The tribal petitioners argued:

> With respect to "consensual relationships" with the Tribe, it is undisputed that respondents deliberately chose to contract with a tribal company to help develop a tribal community center on the reservation. During their extensive dealings on the Reservation, respondents benefited from "the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of a tribal government." Where an individual or company actively seeks out and benefits from tribal society, simple fairness suggests that it should be held accountable under generally applicable principles of tribal law.

Reply Brief of Petitioners at 13-14 (Dec. 27, 1996), *Strate v. A-1 Contractors* (No. 95-1872) (citation omitted) (footnote omitted), *available at* 1996 WL 739255, at **13-14.

Montana exception, which would allow tribal taxation of nonmembers as long as they are within the territorial confines of the reservation. If this Court had intended to establish such a third exception to *Montana*'s general rule, it seems logical that it would have done so when it established and applied its general framework in *Montana* and *Strate*. However, this Court has been careful not to adopt exceptions that "would severely shrink the rule." *Id.* at 458.

At the end of the day, the district court's factual finding that Atkinson Trading's guests have no express consensual arrangements with the Navajo Nation or its members controls the determination of *Montana*'s first exception. In *Montana* itself, the Court applied the first exception in this simple fashion: "Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction." 450 U.S. at 566. Because the transaction at issue here takes place wholly between nonmembers, neither Atkinson Trading nor its guests have a qualifying consensual relationship. *Montana*'s first exception is not met in this case.

B. The Navajo Hotel Occupancy Tax Is Not Authorized by *Montana*'s Second Exception for Threats to Tribal Self-Government

Montana's second exception is also inapplicable here.[26] That exception allows a tribe to regulate nonmember conduct on fee lands "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the

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[26] Neither the court of appeals nor the district court analyzed tribal authority under *Montana*'s second exception. *See* Pet. App. 11a n.8; *id.* at 65a. However, the Navajo Supreme Court based its holding, in part, on its conclusion that *Montana*'s second exception was satisfied in this case, and the Navajo Nation has continued to rely on this exception throughout this litigation.

health or welfare of the tribe." *Montana*, 450 U.S. at 566. Here, the renting of rooms by nonmembers at the hotel has no effect on the tribal interest protected by this exception—the right to tribal self-government. *Strate*, 520 U.S. at 459.

This Court warned in *Strate* that *Montana*'s second exception is not a broad authorization of tribal jurisdiction: "Read in isolation, the *Montana* rule's second exception can be misperceived." *Strate*, 520 U.S. at 459. Instead, the *Strate* Court reasoned that the proper focus of the second *Montana* exception is the preservation of tribal self-government. "Key to its proper application . . . is the Court's preface" in *Montana*:

> "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations."

Strate, 520 U.S. at 459 (citations omitted) (alterations in original). Looking at the automobile accident at issue there, the *Strate* Court concluded that tribal jurisdiction was not "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* (citation omitted). Thus, *Strate* limits the reach of *Montana*'s second exception to cases in which nonmember conduct "would trench unduly on tribal self-government." *Id.* at 458.

The nonmember conduct at issue here—overnight room rentals—has no effect on tribal self-government, let alone the "demonstrably serious" impact required in *Brendale*. *See* 492 U.S. at 431 (opinion of White, J.). A nonmember's overnight stay in a hotel on the reservation certainly has no more effect on tribal self-government than nonmember hunting on the reservation, as in *Montana*, or a nonmember in a gravel truck "driv[ing] carelessly on a public highway running through a

reservation," as in *Strate*. 520 U.S. at 459. A hotel room rental thus does not "trench unduly on tribal self-government." *Id.* at 458.

The Navajo Supreme Court concluded otherwise, however, reasoning that tribal taxation, "that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity." Pet. App. 88a. But that court surely missed the point of *Montana*'s second exception. *Montana* required that the nonmember conduct sought to be regulated—and not the tribal regulation sought to be imposed—must have an impact on tribal self-government before a tribe's authority may attach. *See Montana*, 450 U.S. at 566 ("when *that conduct* threatens or has some direct effect on" tribal self-government) (emphasis added). The Navajo Supreme Court's focus on the exercise of tribal self-government as a justification for the authority to exercise tribal jurisdiction over nonmembers is circular. A tribe could justify every exercise of its taxing power—no matter where exercised or on whom the tax falls—by simply arguing that the taxing power is essential to its existence as a government. *See* Pet. App. 50a (Briscoe, J., dissenting).

It is hard to see the taxation of outsiders as an exercise of tribal *self*-government. Tribes have plenary authority to tax their own members as an exercise of self-governance. *See Wheeler*, 435 U.S. at 322 (tribal "right of internal self-government includes the right to prescribe laws applicable to tribe members"). In fact, in many circumstances, federal case law precludes the states from taxing the economic activity of tribal members who remain on the reservation, precisely because that state taxation of tribal members would interfere with "internal governance and self-determination." *Duro*,

495 U.S. at 686.[27] Under these circumstances, where tribal self-determination exempts tribal members from burdens typically assumed by other citizens, it is particularly troubling for the tribes to rely on the same concept of self-determination to shift the burden of funding their own government to outsiders.

Indeed, permitting the taxation of nonmembers would create a strong temptation for a tribe to support its self-government largely on the shoulders of those who cannot participate in it. Those dynamics are illustrated by the consideration of the tax here. The Executive Director of the Navajo Tax Commission explained that, at the time of the adoption of the HOT, tribal members on the Reservation did not pay taxes: "[A] general consumer, you know, Joe Navajo and all that, they don't have to pay any taxes on the reservation." J.A. 144.[28] He further testified that his Commission had identified several means of raising additional revenues, including an income tax, a gasoline tax, and an expansion of the business activity tax. However, in the end, the Commission chose to avoid these taxes that would fall in part on tribal members, apparently because of the "resistance"

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[27] *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973) (invalidating Arizona state income tax as applied to reservation Indians with income derived wholly from reservation sources).

[28] The existing Navajo taxes fall primarily on businesses, many of which are non-Indian owned. *See* 24 Navajo Tribal Code §§ 201 *et seq.* (possessory interest tax imposed on leaseholds from the Navajo Nation with a value greater than $100,000); 24 Navajo Tribal Code §§ 301 *et seq.* (oil and gas severance tax); 24 Navajo Tribal Code §§ 401 *et seq.* (business activity tax where the deduction of the first $125,000 in gross receipts and the exclusion of Navajo Nation-owned businesses would exclude most, if not all, Navajo businesses). Thus, although the Navajo reservation Indian population exceeds 123,000, *see* U.S. Bureau of the Census, *American Indian and Alaska Native Areas: 1990*, at 40 (June 1991), only 740 taxpayers paid taxes to the Navajo Nation at the time of adoption of the HOT. J.A. 161.

that they would face. J.A. 142-43. Instead, the Tax Commission recommended the HOT as another tax that would fall primarily, if not entirely, on nonmembers. *See* J.A. 145. Indeed, the tribal resolution adopting the HOT states that the tax was designed to have "minimal impacts" on Navajo businesses and Navajo individuals. J.A. 16.

This case thus illustrates the pressures that will inevitably build when a closed society considers raising revenues through the taxation of outsiders. The principle of *Colville* and *Merrion* addresses that problem by permitting taxation when a nonmember enters tribal lands to do business with the tribe. However, a transaction occurring wholly between nonmembers on fee land does not meet the criteria of those decisions. The "self government" exception to *Montana*'s main rule was not designed to permit the shifting of the burdens of government to nonmembers in these circumstances.

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the United States Court of Appeals for the Tenth Circuit and hold that the Navajo Nation may not apply its hotel occupancy tax to a transaction between nonmembers on fee land.

Respectfully submitted,

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No. 00-454

In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

vs.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION, AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTION PRESENTED

Whether the Navajo Nation may impose a hotel occupancy tax on travelers temporarily lodged at a hotel located on an isolated parcel of fee land within the reservation boundary, when:

a) The reservation consists almost entirely of Indian trust lands;

b) The population of the reservation is overwhelmingly Navajo; and

c) The Navajo Nation government provides a broad range of governmental services, including police and fire protection, emergency medical, and tourism promotion.

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STATEMENT OF THE CASE

Petitioner, Atkinson Trading Company ("Atkinson Trading"), is a New Mexico Corporation. Pet'r App. 95a.[1] Atkinson Trading operates a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park on a small parcel of fee land within the exterior boundary of the Navajo Reservation. The business is known as the Cameron Trading Post. Pet'r App. 96a. Atkinson Trading engages in the sale of Indian arts and crafts including beadwork, baskets, textiles, rugs and jewelry. J.A. 34. Atkinson Trading has also engaged in sales to members of the Navajo Nation and purchased arts and crafts from them. Pet'r App. 96a. Atkinson Trading has approximately 120 employees, 75-80 percent of whom are members of the Navajo Nation. Pet'r App. 96a.

The Navajo Nation is a federally recognized Indian Tribe with its reservation located in portions of the states of Arizona, New Mexico and Utah. Pet'r App. 96a. The Navajo Nation is the largest Indian tribe in the nation, both in land area and population. The United States set apart a reservation for the Navajos by treaty in 1868 (15 Stat. 667), and the reservation has been repeatedly enlarged by executive order and statute. *See* J. Lee Correll & Alfred Dehiya, *Anatomy of the Navajo Indian Reservation*, (rev. ed. 1976). Approximately 99.74 percent of the 13,574,060 acre reservation area is held in trust by the United States for the benefit of the Navajo Nation or its members. Approximately 99.5 percent of land area within the Cameron Chapter is held in trust for the benefit the

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[1] Petitioner's Appendix shall be referenced as Pet'r App.

Navajo Tribe or its members. The 1990 Census shows the population of the Navajo Nation as 151,105 with 96.6 percent Navajo members. The population of Cameron Chapter in 1990, where the Cameron Trading Post is located, was 1,035 with 97.7% Navajo. J.L. 181.

By Act of Congress on June 14, 1934, Ch. 521, 48 Stat. 960-62, ("1934 Act"), the exterior boundaries of the Navajo Nation were confirmed. Petitioner's property is completely surrounded by Navajo Nation reservation trust lands. Pet'r App. 96a. The 1934 Act provided an opportunity for any owners of private lands located within the 1934 Reservation boundary to exchange those lands for public lands outside the reservation boundary. *Id.* at § 2. Atkinson's predecessor chose not to take advantage of the land exchange opportunity and remained within the Navajo Indian Reservation.

Atkinson Trading advertises and promotes its Cameron Trading Post business as a way to experience the tradition of an old west Indian trading post operation. *Cameron Trading Post, Old West Hospitality, Modern Comforts,* (visited Feb. 5, 2001) <*http://camerontradingpost.com/history.htm.*> The Cameron Trading Post is portrayed as one of the last authentic trading posts. It continues to serve as an active trade and cultural center blending modern commerce with traditional Indian trading customs. The Cameron Trading Post has been described as an integral part of the surrounding Indian communities. *Id.* The Cameron Trading Post was built in 1916 by Hubert Richardson. Gladwell Richardson, *Navajo Trader,*

135-145 (University of Arizona Press 1986).[2] Hubert Richardson chose the Cameron location because of its proximity to and the potential trading opportunities with wealthy Navajo cattlemen. *Navajo Trader*, 136-137.

Federal Highway 89 and State Highway 64 pass over rights-of-way granted by the Navajo Nation. The highways are jointly patrolled by the Arizona state and Navajo tribal police but the tribal police force is the primary provider of police protection to the Trading Post and the Cameron community. Pet'r App. 57a. A substation of the Navajo Nation police department is located in Cameron. Pet'r App. 57a. When the emergency number 911 is dialed from Atkinson Trading, the response is made by the Navajo Nation Police Department. Pet'r App. 97a. The Navajo police enforce a non-loitering policy on the Cameron Trading Post property. The Navajo police provide assistance to motorists on the highways leading to the Trading Post, including giving directions and changing flat tires. Pet'r App. 57a.

The Navajo fire and the Bureau of Indian Affairs fire departments provide the primary response to calls from the Cameron area. There has been at least one fire at the Trading Post to which the Navajo fire department responded. Pet'r App. 57a. The tribal police and fire departments have also responded to many calls concerning auto accidents in the Cameron area involving both Navajos and non-Navajos. Pet'r App. 58a.

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[2] Gladwell Richardson was the nephew of Hubert Richardson, the founder of the Cameron Trading Post. *Navajo Traders*, at 135.

Emergency medical services in the Cameron area are provided by the Navajo Nation Emergency Medical Service Department. This Department responds to all calls within the Navajo Nation including numerous calls from the Cameron area. Pet'r App. 58a. The Navajo Nation provides a variety of health services to members and nonmembers through the Navajo Nation Division of Health, including health inspection of food vendors on all sites within the territorial jurisdiction of the Navajo Nation. Pet'r App. 97a. Atkinson Trading has disposed of its solid waste on the Navajo Reservation. J.A. 40-41. The Navajo Nation Tourism Department uses tribal funds to provide facilities at several tourist areas on the Navajo Nation to promote the health and safety of tourists traveling across the Navajo Nation. Pet'r App. 97a. These governmental services directly benefit Atkinson Trading Company. The Navajo Nation Government funds a broad range of government activities, including economic development, community development, human resources, natural resources, public safety, health services, social services, education, legislative and judicial services and functions. Pet'r App. 98a.

Tourism attractions on the Navajo Nation are visited by more than 2,000,000 tourists a year. Exh. F at 127. The majority of these tourists visit historical sites or experience Indian culture. J.A. 71. In the early days of the Cameron Trading Post, just as they are now, tourists were filled with curiosity about the Navajo. *Navajo Trader*, at 142. Travelers also visit the Navajo Nation because of their interest in arts and crafts and outdoor recreation. J.A. 71.

On July 30, 1992, the Navajo Hotel Occupancy Tax was signed into law by the President of the Navajo Nation. The Hotel Occupancy Tax taxes all persons who pay for the use or possession of a room or space which costs $2.00 or more per day in a hotel which is located within the exterior boundaries of the Navajo Nation. Pet'r App. 98a. The Hotel Occupancy Tax requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission and file reports on the tax with the Navajo Tax Commission. Pet'r App. 98a. The rate of the tax is eight percent of the price of the room. 24 N.N.C. § 103. The hotel operator is allowed to retain one percent of the tax due as reimbursement for the cost of collecting the tax. 24 N.N.C. § 109. The Hotel Occupancy Tax is imposed on travelers at all hotels within the exterior boundaries of the Navajo Nation without regard to whether the hotel is located on trust or fee land. Pet'r App. 98a. All of the hotels within the Navajo Nation collect and pay the tax. The Navajo Nation currently collects approximately $1,200,000.00 per year from the hotel occupancy tax. The tax collected and remitted by Atkinson Trading from its guests amounts to less than seven percent of the total hotel occupancy taxes collected by the Navajo Nation.

In addition to the Hotel Occupancy Tax, the Office of the Navajo Tax Commission administers a Business Activity Tax, 24 N.N.C. §§ 401 *et seq.*, a Possessory Interest Tax, 24 N.N.C. §§ 201 *et seq.*, an Oil and Gas Severance Tax, 24 N.N.C. §§ 301 *et seq.*, a Tobacco Products Tax, 24 N.N.C. §§ 800 *et seq.*, and a Fuel Excise Tax, 24 N.N.C. §§ 901 *et seq.* Like the Hotel Occupancy Tax, none of the

tax statutes distinguish between taxpayers on the basis of tribal membership. Currently, joint compliance and enforcement agreements between the Navajo Nation and the States of Arizona and New Mexico are in effect.[3]

SUMMARY OF ARGUMENT

The taxing power of the Navajo Nation is an attribute of its retained sovereignty. The taxing power enables a tribal government to fund its essential governmental services, including police and fire protection. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

The Navajo Nation government is the primary provider of governmental services within the exterior boundaries of the 13.5 million acre Navajo reservation. Pet'r. App. 97-98a. Travelers voluntarily enter the Navajo Reservation and choose to stay overnight. While there,

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[3] The Office of the Navajo Tax Commission has entered into an intergovernmental agreement with the Arizona Department of Revenue for the joint audit and collection of the tobacco products taxes. (March 24, 1998). The Office of the Navajo Tax Commission has entered into intergovernmental agreements with the Arizona Department of Transportation (May 19, 1999) and the New Mexico Taxation and Revenue Department (February 29, 2000) for the joint audit and collection of the-fuel excise taxes. The Office of the Navajo Tax Commission has entered into an intergovernmental agreement with the Arizona Department of Revenue for the joint audit and collection of the Navajo Hotel Occupancy Tax, the Navajo Business Activity Tax and the Arizona Transaction Privilege Tax. (February 8, 2001).

these travelers benefit from the provision of police protection and other governmental services as well as the advantages of a civilized society that are assured by the existence of the Navajo Nation government. *Merrion,* 455 U.S. at 137-138; *Exxon Corp. v. Wisconsin Dept. of Revenue,* 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a tax very similar to the Navajo Hotel Occupancy Tax when they provide comparable governmental services. 24 N.N.C. §§ 101 *et seq.*

The Navajo Reservation like the Jicarilla Reservation in *Merrion* is overwhelmingly Indian in character. Ninety-nine and seven-tenths percent of the land area is held in trust by the United States for the benefit of the Navajo Nation or its members. Approximately 97 percent of the population is Navajo. The enormous trust land area, the large Navajo population, and the predominance of Navajo governmental services authenticates its dominant Indian character.

The fact that a very small parcel of land within its reservation is owned in fee does not deprive the Navajo Nation of the authority to tax to raise revenues to defray the costs of government. *Merrion,* 455 U.S. at 144.

Montana v. United States concerned the ability of the Crow Tribe to regulate hunting and fishing by nonmembers on lands owned in fee simple by nonmembers, where the land was located within the exterior boundaries of the Crow Reservation. *Montana v. United States,* 450 U.S. 544 (1981). The Court's acknowledgment of an Indian nation's inherent taxing authority is clearly set forth in the decisions that form the basis of the exception

to the *Montana* rule cited by this Court in its decision. The inherent authority exception interpretation of *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), in *Montana* has been consistently recognized by the Court in other cases. In *Merrion*, the Court reiterated that the Jicarilla's power to tax was not simply based on the tribe's right to exclude, but was an inherent power of the Jicarilla Tribe. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143-144 (1982).

The Court characterized its understanding of the type of cases that fit within the first *Montana* inherent authority exception for "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997). It is abundantly clear that the trilogy of decisions in *Montana*, *Merrion* and *Strate* recognize a tribe's inherent right to impose taxes for the privilege of engaging in economic activity within its borders. All of these cases have cited to *Buster* as being an exception to the *Montana* rule. *Montana* and *Strate* do not limit a tribe's taxing authority over noncitizens on fee land within the exterior boundaries of an Indian reservation. In fact, they both recognize the tribal taxing power as an inherent authority exception to the general rule in *Montana*.

ARGUMENT

I. THE NAVAJO NATION RETAINS INHERENT POWER TO TAX ACTIVITIES WITHIN THE EXTERIOR BOUNDARIES OF THE NAVAJO NATION.

A. The Power To Tax Is A Fundamental Attribute Of Sovereignty Which The Navajo Nation Retains.

The power to tax is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (*Colville*). The taxing power enables a tribal government to raise revenues to fund its essential governmental services and to defray the cost by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs. *Kerr McGee v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985); see President's Statement on Indian Policy, 19 Weekly Comp.Pres.Doc. 98, 99 (Jan. 24, 1983).

This Court has recognized taxes are a means of distributing the burden of the cost of government. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 508 (1937). The most fundamental principle of government is that it exists to provide for the common good. A taxpayer cannot object to the use of the taxes for the maintenance of schools because it has no children. *Thomas v. Gay*, 169

U.S. 264 (1898). Taxes are not an assessment of specific benefits to the taxpayer. The only benefit to which a taxpayer is entitled is his enjoyment of the privileges of living in an organized society established and safeguarded by the devotion of taxes. *Carmichael*, 301 U.S. at 522. The Court has repudiated the suggestion that the benefits derived from the expenditure of public moneys are required to be apportioned to the burdens of the taxpayer or that he can resist the payment of the tax because it is expended for purposes which are not peculiarly beneficial to him. *Carmichael*, 301 U.S. at 521-523.

The Court has acknowledged it is not unfair to ask a taxpayer to share in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' " *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980), quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979). See *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos.*, 435 U.S., at 750-751, *id.*, at 764, (POWELL, J., concurring in part and concurring in result); *General Motors Corp. v. Washington*, 377 U.S. 436, 440-441 (1964). Atkinson Trading is asking this Court to relieve it of the responsibility of collecting and remitting the Navajo Hotel Occupancy Tax. Pet'r Brief at 41. Atkinson is seeking to gain a competitive advantage as against other hotel operators on the Navajo Reservation.[4] The

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[4] If Atkinson Trading were not required to collect and remit the eight percent hotel occupancy tax on behalf of its customers, it would gain an eight percent pricing advantage against other hotel operators within the Navajo Nation that do collect and remit the tax.

burden imposed on travelers visiting the Navajo Nation through application of the hotel occupancy tax is limited and consistent with the governmental services received by both the travelers and Atkinson Trading. There is no tax principle that requires the taxes received from a taxpayer to equal the benefits it receives. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190 (1989). Any limitation tied to the benefits received would place such commerce in a privileged position. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-624 (1981). The Court has applied these same taxation principles when it has considered the basis and extent of tribal taxing authority. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (*Colville*), *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Kerr McGee v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

The reservation in *Merrion* was very similar to the Navajo reservation. The Jicarilla Apache Tribe's reservation contains 742,315 acres, all of which are held as tribal trust property. *Merrion*, 455 U.S. at 133. In this case, 13,538,775 acres or 99.74% of the land area within the boundaries of the Navajo reservation is held in trust by the United States. Approximately 2,100 individuals lived on the Jicarilla Apache reservation. In this case, more than 150,000 Navajos reside on the Navajo Reservation. However, in *Merrion*, there was no discussion of the extent of tribal governmental services provided. In this case, there is extensive evidentiary proof of the nature and magnitude of the Navajo government's presence in the area. Pet'r App. 97a-98a.

In a case involving the tribal zoning power, Justice Stevens, announced the judgment of the Court holding

that the Tribe had authority to zone private fee lands located within the Yakima Indian Reservation. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989). The fact that a very small proportion of the closed area was owned in fee did not deprive the Tribe of the right to ensure that this area maintained its unadulterated character. This is particularly so in a case such as this in which the hotel occupancy tax at issue is neutrally applied, is necessary to protect the welfare of the Tribe, and does not interfere with any significant state or county interest. *Brendale,* 492 U.S. at 444. The Hotel Occupancy Tax at issue in this case is neutrally applied to all people who rent a room within the Navajo Nation. All people in the class of people who rent rooms are treated the same. *Miami Dolphins Ltd. v. Metropolitan Dade County,* 394 So. 2d 981 (Fla. 1981). The burden of the tax falls equally upon those who exercise the privilege of occupying a room within the Navajo Nation. *Gowens v. City of Bakersfield,* 13 Cal Rptr. 820, 824 (1961).

Justice Stevens described zoning as the process whereby a community defines its essential character. The community determines its character driven by a concern for health and safety, esthetics, or other public values. Zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually or more often unilaterally destructive. *Brendale,* 492 U.S. at 433. Taxes are viewed as a means of distributing the burden of the cost of government. *Carmichael v. Southern Coal & Coke Co.* 301 U.S. 495, 508 (1937). The most fundamental principle of government is that it exists to provide for the common good. *Thomas v. Gay,* 169 U.S. 264 (1898). The purpose of zoning is the protection of the community

and the public. The purpose of taxes is to fund services for the public good.

Justice Stevens explained that since Yakima maintained the power to exclude nonmembers from entering all but a small portion of the closed area, the Tribe preserved the power to define the essential character of that area. The closed portion of the Yakima Reservation occupied 807,000 acres with 25,000 or three percent of these acres being owned in fee. *Brendale,* 492 U.S. at 438. In the instant case, 99.74% of the 13.5 million acre Navajo Reservation is held in trust for the Navajo Nation or individual tribal members by the United States. Less than three-tenths of one percent of the entire land area within the exterior boundaries of the Navajo Reservation is held in fee by nonmembers. The 1990 Census shows the population of the Navajo Nation as 96.6% Navajo. J.L. 182. The population of Cameron Chapter in 1990, where the Cameron Trading Post is located, was 1,035 with 97.7% Navajo. J.L. 181.

The Navajo Nation is without question the primary provider of governmental services on the Navajo reservation and specifically in the Cameron Chapter community area. Pet'r App. 97-98a. It is clear that the Navajo Nation has assumed the responsibility for the preservation of an organized society within the Navajo Reservation.[5]

There can be no disagreement that the Navajo Nation and the Cameron Chapter possess an overwhelming

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[5] The Navajo Nation expends its general fund revenues to fund a wide array of governmental functions which creates the environment that enables businesses such as Atkinson Trading to engage in economic activity and allows tourists to experience the scenery and culture of the Navajo Nation. J.L. 166.

Indian character. The enormous trust land area, the large Navajo population and the predominance of Navajo governmental services in the area establish its fundamental Indian character. By maintaining the power to exclude nonmembers from entering all but a very small portion of the Navajo Nation, the tribe has preserved the power to tax to raise revenues to pay for the costs of government. *Merrion,* 455 U.S. at 144. The fact that nonmembers may now drive on certain highways does not change the character of the reservation nor undermine the tribe's power to tax. *Brendale,* 492 U.S. at 439. The Hotel Occupancy Tax does not interfere with any state or county interest present here.[6] On the contrary, the Navajo Nation and the State of Arizona have cooperated in the compliance and collection of mutual taxes through joint audit and enforcement agreements. One of the agreements covers this very Hotel Occupancy Tax. The agreement provides for the joint audit, enforcement and sharing of information with respect to this and other taxes.

The fact that a minuscule proportion of the Navajo Nation is owned in fee does not deprive the Tribe of the power to tax to contribute to the general cost of providing governmental services. *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 623-624 (1981). This is particularly true in a case such as this in which the taxing statute at issue is neutrally applied, is necessary to protect the welfare of the Tribe by funding essential governmental services, and does not interfere with any significant state or county interest. *Brendale,* 492 U.S. at 444.

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[6] It is important to note that the State of Arizona did not file an amicus brief in support of petitioner.

In *Merrion*, the Petitioner availed itself of the "substantial privilege of carrying on business" on the reservation. *Merrion*, 455 U.S. at 137; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 437 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940). These travelers enter the Navajo Reservation and choose to stay overnight. They voluntarily put themselves in the position of possibly needing assistance from Navajo Nation government personnel. Motor vehicle accidents involving tourists have occurred. Navajo Nation police, fire and emergency medical personnel have responded to such accidents in the past and are available to respond in the future. Tribal police officers provide directions to travelers and provide other assistance. Tribal police patrol the Cameron Trading Post and remove loiterers and intoxicated individuals. The mere presence of the Navajo Nation police on the highways, enforcing traffic and other laws, contributes to the health and safety of the travelers through the deterrence of unsafe or illegal behavior. The Navajo Nation's Tourism Department provides information to travelers and works on projects designed to enhance the experience of travelers visiting the reservation. Pet'r App. 66a. In sum, these travelers benefit from the provision of police protection and other governmental services, as well as from " 'the advantages of a civilized society' " that are assured by the existence of the Navajo Nation government. *Merrion*, 455 U.S. at 137-138; *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a hotel occupancy tax similar

to that imposed by the Navajo Nation when they provide comparable services.

Under these circumstances, there is nothing exceptional in requiring travelers to contribute through taxes to the general cost of tribal government. *Merrion*, 455 U.S. at 138, Cf. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624-629, (1981); *id.*, at 647 (BLACKMUN, J., dissenting); *Mobil Oil Corp. v. Commissioner of Taxes, supra*, 445 U.S. at 436-437. This Court has recognized the congressional concern with "fostering tribal self-government" through various Acts governing Indian tribes.[7] *Colville*, 447 U.S., at 155. It simply does not make sense to expect the tribes to carry out governmental functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes, severance taxes, or hotel occupancy taxes. *Merrion*, 455 U.S. at 138 n.5.

In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S.134 (1980), decided only 10 months prior to *Montana*, the Court upheld the Tribes' transaction tax on tobacco sales whose legal incidence fell primarily

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[7] The Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* (1975), evidence to varying degrees a congressional concern with fostering tribal self-government. *See also*: Indian Self-Determination and Education Assistance Act Amendments of 1988, P.L. 100-472, Title I, § 101, 102 Stat. 2285 (1988); and the Tribal Self-Governance Act of 1994, P.L. 103-413, Title II, § 201, 108 Stat. 4270 (1994).

upon non-Indians. The transactions occurred in retail outlets located on trust land. The Court held that the power to tax non-Indians was not inconsistent with the Tribes' dependent status and had not been preempted by congressional legislation or state taxes on the same tax base. But the Court also upheld the State of Washington's concurrent tax on nonmember purchases even though the transactions occurred on trust land, holding that both governments possessed a legitimate interest in raising revenue to fund services. *Colville*, 447 U.S. 156-57.

The widely held understanding within the Federal Government that federal law has not worked a divestiture of Indian taxing power has been consistently expressed. *Colville*, 447 U.S. at 152. Executive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. *Colville*, 447 U.S. at 152, 153; 17 Op. Att'y Gen. 134 (1881); 7 Op. Att'y Gen. 174 (1855), including jurisdiction to tax, 23 Op. Att'y Gen. 214 (1900); *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934). According to the Solicitor of the Department of the Interior:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions. *Ibid.* (emphasis added).

In these respects, the present case is markedly different from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which the Court stressed the shared assumptions of the Executive, Judicial, and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians. In the present case, there is simply no overriding federal interest that would necessarily be frustrated by the application of the Navajo Hotel Occupancy Tax to travelers who enter the reservation and then choose to stay overnight within the exterior boundaries of the Navajo Nation.

B. The Navajo Nation's Power To Govern And Pay For The Costs Of Government Provide The Basis For The Authority To Tax.

The power of taxation rests on a tribe's territorial jurisdiction, and not solely on the power to exclude nonmembers from the reservation. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143 (1982). In *Merrion*, the Court upheld the Jicarilla Apaches' right to impose a severance tax on non-Indian oil and gas production on the reservation. The activity taxed occurred on trust land pursuant to leases providing the lessees the exclusive right to extract oil and gas on the lease premise for so long as the minerals are produced in paying quantities. The petitioners argued that since the activity took place on trust land, the tribe lacked authority to impose the tax because it had ceded its power to exclude the nonmember lessee upon entering into the leases. The Court rejected the assertion that an Indian tribe's authority to tax non-

Indians who do business on the reservation stems exclusively from its power to exclude such persons from tribal land. The Court in *Merrion* explained:

> . . . there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.

Merrion, 455 U.S. at 142. Under this analysis, the fact that it is a nonmember conducting business with mostly nonmembers on fee land has no bearing on the tribe's power to tax, so long as the activity to be taxed is within the governmental jurisdiction of the tribe. *Merrion*, 455 U.S. at 141, 142.

The Court did not believe that the territorial component to Indian taxing power meant that the tribal authority to tax was derived solely from the tribe's power to exclude nonmembers from tribal lands. This Court explained that:

> . . . the decision in *Buster v. Wright* actually undermines the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands. Under this theory, a non-Indian who establishes lawful presence in Indian territory could avoid paying a tribal tax by claiming that no residual portion of the power to exclude supports the tax. This result was explicitly rejected in *Buster v. Wright*.

> In *Buster*, deeds to individual lots in Indian territory had been granted to non-Indian residents, and cities and towns had been incorporated. As a result, Congress had expressly prohibited the Tribe from removing these non-Indian residents. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained its power to tax. The court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.*" 135 F., at 952 (emphasis added). This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.

Merrion, 455 U.S. at 143, 144. The Court chose not to embrace a new restriction on the extent of the tribal authority to tax. It concluded that the Tribe had the authority to impose a severance tax on the mining activities of petitioners as part of its power to govern and to pay for the costs of self-government based on the views of each of the federal branches, *general principles of taxation*, and the conception of Indian tribes as domestic, dependent nations. *Merrion*, 455 U.S. at 143-144. Atkinson argues that the tax should not apply because its land when originally acquired was not within the reservation boundary. Pet'r Brief at 3. Atkinson Trading's predecessor chose not to take advantage of the land exchange

opportunity under the 1934 Act and remained within the Navajo Indian Reservation. But these sorts of changed circumstances which were much more significant in *Buster* had no impact on the Court's analysis there, and similarly should not affect the Court's determination here.

Here as in *Merrion* the Court should measure tribal taxing power by standards regularly applied to states. So long as the tax is fairly apportioned, and is levied upon those whose activity presents a nexus with the taxing entity, there is nothing exceptional in requiring Atkinson to remit and the Navajo Nation travelers to contribute through taxes to the general cost of tribal government. *Merrion*, 455 U.S. 130, at 138, 156; *citing to Commonwealth Edison v. Montana*, 453 U.S. 609 (1981), and *quoting Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). These travelers willingly enter the Navajo Reservation and stay overnight. The Navajo Nation government is available to provide governmental services to these travelers as needed. Travelers benefit from the provision of police protection and other governmental services, as well as from " 'the advantages of a civilized society' " that are assured by the existence of tribal government throughout the Navajo Reservation and at the Cameron Trading Post. *Merrion*, 455 U.S. at 137-138; *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a hotel occupancy tax similar to that imposed by the Navajo Nation when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring the travelers to contribute through taxes to the general cost of tribal government. *Merrion*, 455 U.S. at 138, Cf. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609,

624-629 (1981); *id.*, at 647 (BLACKMUN, J., dissenting); *Mobil Oil Corp. v. Commissioner of Taxes*, supra, 445 U.S. at 436-437. Atkinson Trading engages in a business on the property known as the Cameron Trading Post. Pet'r App. 96a. Atkinson Trading conducts business with members of the Navajo Nation as it has since the founding of the Cameron Trading Post. Pet'r App. 96a; *Cameron Trading Post, Old West Hospitality, Modern Comforts* (visited Feb. 5, 2001) <*http://camerontradingpost.com/history.htm.*> There really can be no argument that the Navajo Nation has provided the economic environment which allows the travelers to visit and stay on the Navajo Nation. It is only fair to require these travelers to contribute to the general cost of providing governmental services from which they benefit. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-624 (1981).

II. NEITHER *MONTANA* NOR *STRATE* LIMIT THE NAVAJO NATION'S TAXING AUTHORITY IN THIS CASE.

A. *Montana v. U.S.* Recognizes The Inherent Taxing Jurisdiction Of An Indian Nation Over Indian Traders And Their Economic Activities.

Montana v. United States concerned the authority of the Crow Tribe to regulate hunting and fishing by non-members on fee lands owned by nonmembers, where the land was located within the exterior boundaries of the Crow Reservation. *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, approximately 28 percent of the reservation was held in fee by non-Indians. *Montana*, 450 U.S. 549. In this case less than three-tenths of one percent of the reservation is held in fee by nonmembers. In *Montana*,

the State of Montana stocked the waters of the reservation with fish. *Montana,* 450 U.S. 549. In this case the Navajo government is the predominant provider of governmental services. Pet'r App. 97-97a.

Montana is not a tax case. It is a case involving regulatory authority. The regulatory statute at issue in *Montana* was not like the field of taxation, where the laws of both the Tribe and the State may be enforced simultaneously. *Colville,* 447 U.S. at 158. Regulatory statutes do not allow for dual application of conflicting regulatory statutes. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 343, 344 (1983). Taxation aimed at regulating an activity would fall under *Montana's* test. This Court's recognition of an Indian nation's inherent taxing authority is best illustrated by reviewing one of the cases that forms the foundation of the exception to the *Montana* rule cited by the Court in its decision. The Court in *Montana* acknowledged the inherent taxing authority of Indian nations by declaring:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, *through taxation,* licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity,

> the economic security, or the health or welfare of the tribe.

Id. at 565-566 (emphasis added).

The *Montana* Court's decision explicitly held that a tribe may regulate, through taxation. *Id.* at 565. One of the cases cited by the Court for the *Montana* inherent power exception was *Buster v. Wright*. *Id.* at 565. In *Buster*, C.W. Buster, a non-Indian, owned and operated a grocery store located on fee land which was surrounded by reservation trust land. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) *appeal dismissed*, 203 U.S. 599 (1906). The Eighth Circuit held that Buster, the trader, was subject to a tribal tax imposed by the Creek Nation and that the tribe could employ the Secretary of the Interior to enforce it. 135 F. at 954.

The authority of the tribe to tax the non-Indian trader was not based on the tribe's ability to exclude Mr. Buster from the exterior boundaries of the Creek Indian Reservation. Instead the authority was found to be inherent, and the fee status of the land was simply not relevant to the question of tribal power to tax. The *Buster* court stated:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

135 F. 950. The *Buster* Court recognized that a tribal government has the power to tax the economic activity of those who choose to engage in economic activity within the exterior boundaries of an Indian reservation. There is no express congressional act that specifically exempts Indian traders from their responsibility to collect or pay Indian taxes. Like the Indian trader in *Buster,* Atkinson is subject to conditions which the Navajo Nation may choose to put upon its privilege of doing business within the reservation. Like the Creek Nation in *Buster,* the Nation possesses the lawful authority to require the remittance of the tax collected as a condition precedent to the exercise of the privilege of trading within its borders. *Buster,* at 949. The authority of the Navajo Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in an act of Congress, treaty, or agreement of the United States. Instead, it is one of the inherent and essential attributes of its original sovereignty. *Merrion,* 455 U.S. at 141. It is an inherent right of the Navajo Nation, indispensable to its autonomy as a distinct tribe or nation, and it remains an attribute of its government. *Buster,* at 950.

It is important to note that Atkinson Trading has been determined to be an Indian Trader under 25 U.S.C. §§ 261 *et seq.* and 25 C.F.R. § 141. *Ashcroft v. United States Dept. of Interior,* 679 F.2d 196, 199 (9th Cir. 1982). As an Indian Trader, Atkinson's circumstance is virtually identical to that of C.W. Buster. The activities carried on by Atkinson Trading are very similar to the activities carried on by C.W. Buster and there is no legitimate way to distinguish this case from *Buster.*

B. *Strate v. A-1 Contractors* Reaffirms The Inherent Taxing Jurisdiction Of An Indian Nation Over Indian Traders And Their Economic Activities.

More recently, the Court reiterated its recognition of the inherent authority of Indian nations to impose their taxes on nonmembers on fee lands within the exterior boundaries of an Indian reservation. *Strate v. A-1 Contractors,* 520 U.S. 438 (1997). *Strate* concerned the adjudicatory authority of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation over a personal injury action with nonmember defendants. The accident that generated the personal injury action occurred on a highway maintained by the State running through the Fort Berthold Indian Reservation. Neither of the parties to the auto accident were members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation. The Court held that the specific right-of-way grant in *Strate* was equivalent to non-Indian land for nonmember governance purposes. *Strate v. A-1 Contractors,* 520 U.S. 438, 454 (1997). The Court then determined that the highway accident did not meet either of the two retained inherent sovereignty exceptions identified in *Montana. Strate,* at 457-459.

The Court held that the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation did not possess adjudicatory authority over the personal injury claim where both of the automobile accident participants were not members of the Tribe. In making its determination, the Court reinforced the validity of a line of cases that support inherent tribal taxing authority over nonmember economic activity on fee lands within the

exterior boundaries of an Indian reservation. *Strate,* at 457.

The Court in *Strate* recognized that the inherent civil authority of Indian tribes and their courts extended to nonmembers who enter relationships with the tribe or its members, citing *Montana,* 450 U.S. at 565, 566; and to non-Indians entering the reservation to engage in economic activity, citing *Colville,* 447 U.S. at 153. *Strate,* at 457. This Court explained its understanding of the type of cases that fit within the first *Montana* inherent authority exception for "activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements." *Strate,* at 457.

> *Montana*'s list of cases fitting within the first exception, see 450 U. S., at 565-566, indicates the type of activities the Court had in mind: *Williams v. Lee,* 358 U. S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock,* 194 U. S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright,* 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville,* 447 U. S., at 152-154 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain

unless divested of it by federal law or necessary implication of their dependent status").

It is abundantly clear that the trilogy of decisions in *Montana, Merrion* and *Strate* have recognized a tribe's inherent right to impose taxes for the privilege of engaging in economic activity within its borders. All of these cases have recognized the factual situation in *Buster* as being an exception to the *Montana* rule. The factual situation in this case calls for the identical result. A tribe's power to tax is broader than its civil adjudicatory jurisdiction over nonmembers. *Burlington Northern R. Co. v. Red Wolf,* 196 F.3d 1059, 1063 (9th Cir. 2000).

CONCLUSION

The power to tax is a fundamental attribute of sovereignty which the Navajo Nation retains. The taxing power enables the Navajo Nation to pay for the cost of governmental services it provides throughout the Navajo Reservation. The fact that a minuscule portion of the Navajo Reservation is owned in fee does not deprive the Navajo Nation of its taxing power over travelers who rent hotel rooms located on these fee lands. The overwhelming trust land area, the Navajo population and the predominance of Navajo governmental services support the imposition of the hotel occupancy tax on travelers who are the recipients of the benefits of an organized society.

It is only appropriate that the travelers contribute a small amount to the funding of the governmental services from which they benefit.

The judgement of the Court of Appeals should be affirmed.

Respectfully submitted this 15th day of February, 2001.

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IN THE
Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner has argued that a tribal government closed to nonmembers may not impose a tax on a transaction occurring wholly between nonmembers on fee land. The Navajo Nation and its amici have responded with an array of theories, often in tension with one another, and certainly in conflict with the governing framework prescribed by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

Remarkably, neither the Navajo Nation nor most of its amici defend the reasoning of the Tenth Circuit. Indeed, some are openly critical of the court of appeals' "sliding scale" test. *See, e.g.*, United States Brief at 15 ("U.S. Br.").

The Navajo Nation contends that it can impose the tax based on "inherent" authority that "did not have its origin in an act of Congress, treaty, or agreement of the United States." Resp. Br. at 25. However, the Navajo Nation makes no effort to satisfy the requirements of *Montana* with respect to inherent authority. The United States, on the other hand, concedes that *Montana* limits a tribe's inherent authority, but asserts that the Navajo Nation has obtained the power to tax the hotel as a result of Indian trader regulations adopted by the Department of the Interior. However, neither those regulations nor the Indian trader statutes contain the kind of express congressional delegation required by *Montana* and *Strate* for an expansion of tribal powers over nonmembers.

In the end, none of the responses provides an explanation as to why the nonmember *guests* of petitioner's hotel are subject to tribal sovereignty. The guests do not engage in consensual economic activity with the Tribe or its members. The rental of hotel rooms by the guests poses no threat to tribal self-governance. The tax imposed here does not comport with the framework established in *Montana*.

I. *MONTANA* PROVIDES THE RULE OF DECISION FOR THIS DISPUTE

Because nonmembers are wholly excluded from participation in tribal government, Pet. Br. at 16-17 & nn. 3-5, fundamental notions of fairness dictate that the reach of tribal power should ordinarily be limited to tribal members. Accordingly, *Montana* recognized "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565.

Certain amici attempt to downplay the significance of the closed nature of tribal governments, arguing that federal or state "government entities regularly impose taxes on persons or entities who are not represented before them." Brief of *Amici Curiae* Confederated Tribes of the Umatilla Indian Reservation at 12 n.5 ("Umatilla Br."). However, under our constitutional scheme, the federal and state governments are recognized to possess the attributes of full sovereigns. "A basic attribute" of this "full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Duro v. Reina*, 495 U.S. 676, 685 (1990). This Court has specifically recognized that "the tribes can no longer be described as sovereigns in this sense." *Id.* at 685. Rather, "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order." *Id.* at 685-86. Thus, reliance on the full sovereign powers of other governments under our constitutional scheme is unavailing.[1]

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[1] Equally important, federal and state governments are constrained by a constitutional framework that mandates equal voting rights and equal protection of the laws. Given these constraints, federal and state sovereigns have full authority over all persons who come within their borders. Tribal governments are not accorded the same status, at least in part because, from the outset, they were not subject to the same

Notwithstanding these inherent limitations on a tribe's authority to regulate its external relations, the Navajo Nation suggests that tribal taxation is a "fundamental attribute" of tribal sovereignty that may be exercised over nonmembers and that an Indian tribe may tax anyone who enters the reservation. This proposed rule, which admits of no limiting principle, rests on a territorial concept of tribal sovereignty that has been rejected repeatedly by this Court. *See* Pet. Br. at 14-18; *accord* U.S. Br. at 12 ("This is not to say, of course, that a Tribe has plenary power to tax non-Indians on its reservation, at least on lands owned in fee by non-Indians.").

The Tribe and its amici, relying on this Court's statement of *Montana's* first exception, attempt to confine the reach of *Montana* in the tax realm to so-called "regulatory" taxes. *See, e.g.*, Resp. Br. at 23; Umatilla Br. at 14-23. They argue that taxes designed to raise revenue do not fall within *Montana*'s scope. This argument finds no support in *Montana* or any subsequent decision of this Court.

First, this Court has made clear that *Montana* was intended to apply to *all* exercises of tribal civil authority over nonmembers. "Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.'" *Strate*, 520 U.S. at 453. The blanket statements of the Court in this regard are not qualified by the purpose that a tribe seeks to achieve in exercising its civil authority.

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constitutional constraints. *See Duro*, 495 U.S. at 693 ("It is significant that the Bill of Rights does not apply to Indian tribal governments."). Thus, the problem with the exercise of tribal sovereignty over a nonmember is not simply that the particular nonmember cannot vote, but more generally that tribes do not permit the kind of full and democratic participation of all citizens on an equal basis that is the predicate for the recognition of full sovereignty within our constitutional framework.

Second, *Montana* itself did not accept this artificial distinction based on the tax's purpose. The cases cited by *Montana* and *Strate* to illustrate the consensual relationship exception included *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), where this Court characterized the taxes at issue as solely revenue-raising in nature. *See id.* at 158; Umatilla Br. at 18-19.[2]

Finally, the distinction simply makes no sense. Under this view, a tribe could not impose a $15 hunting license fee on a non-Indian hunting on his fee land, but could impose a 15% income tax on the same non-Indian on the same land. The regulatory/revenue-raising distinction is even more specious here because the Tribe invokes regulatory power to enforce the collection and payment of the tax, going so far as to claim the right to close down non-compliant businesses. *See* 24 Navajo Tribal Code § 117. Under analogous circumstances, this Court has held that a state may not impose taxes on reservation Indians where it lacks civil and criminal jurisdiction to enforce the tax. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 178-79 (1973).

As the United States recognizes, *Montana* applies to all forms of civil authority, including taxation. *See* U.S. Br. at 12-13. This Court should reject the attempts by the Navajo Nation and its amici to limit the scope of *Montana*.

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[2] The Umatilla amici cite a passage of *Colville* in which the Court made a distinction between purely regulatory taxes and revenue-raising taxes. *See* Umatilla Br. at 19. In that passage, however, the Court was conducting a preemption analysis to determine whether a state tax law and a tribal tax law could coexist. The Court reasoned that it was only where both governments' tax laws were designed to regulate conduct that they might conflict so seriously as to require invalidation of one or both. *Colville*, 447 U.S. at 158-59. This distinction is irrelevant in a case such as this, where the issue is not whether a tribal law conflicts with state law, but rather whether the tribe had the jurisdiction to enact the law in the first instance.

II. *MONTANA* LIMITS TRIBAL AUTHORITY OVER NON-INDIANS ON FEE LAND

Over a century of case law culminating in *Montana* holds that tribes possess sovereignty over tribal trust lands, but not over nonmembers on their own fee lands. *See* Pet. Br. at 15-16; Brief of *Amicus Curiae* Association of American Railroads at 10-13. The Navajo Nation and its amici argue that this historic limitation has been modified by two cases: *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In the circumstances presented here, neither case provides an exception to the rule of *Montana*.

A. *Brendale* Does Not Provide the Governing Standard in This Case.

The Navajo Nation, echoed by the United States, argues that the Navajo Reservation is essentially a "closed reservation," in which fee land is an anomaly, so that taxes may be imposed on nonmembers on fee land. Respondents seek to invoke the plurality opinion in *Brendale*, which concluded that the Confederated Tribes had the authority to zone nonmember fee land within the portion of the Yakima Reservation that was closed to the general public. *See* Resp. Br. at 11-14. This *Brendale* argument has never been raised in the federal proceedings in this case; the Navajo Nation did not even cite *Brendale* in its briefs in the Court of Appeals.

Brendale involved both a different set of facts and a different issue. Justice Stevens, joined by Justice O'Connor, found that the power of the Confederated Tribes to zone each area of the reservation "depends on the extent to which the Tribe's virtually absolute power to exclude has been either diminished by federal statute or voluntarily surrendered by the Tribe itself." 492 U.S. at 433. In the closed area of the reservation, this power had been preserved. There were

"no permanent inhabitants of the Yakima County portion of the closed area." *Id.* at 438. The tribes strictly limited access to "selected groups of visitors" under a "'courtesy permit system'" for limited purposes, such as hiking and sightseeing. *Id.* at 439. The closed area was monitored by tribal officials, who maintained "four guard stations" and patrolled the interior of the closed area. *Id.* It was only under those circumstances that the plurality concluded that the tribes retained the right to zone fee land.

The record in this case shows that the area of the Navajo Reservation encompassing the Cameron Trading Post could not be more different. The Navajo Nation Director of Tourism testified that the Reservation is "open to the general public," with only "certain areas" of the Reservation (not relevant here) controlled by a permit system. J.A. 61. Thousands of nonmembers live and operate businesses on fee land within the Navajo Reservation. *See* J.L.M. 182. It is traversed by state and federal highways. J.A. 63-64. In addition to hotels, it has gas stations, shopping centers, fast food restaurants and movie theatres. *See, e.g.*, J.A. 119. Nothing limits non-Indian guests from travelling to and staying at the Trading Post. *Id.* at 29, 63-64. Consequently, the analogy to the closed portion of the Yakima Reservation is unavailing.[3]

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[3] The Navajo Nation asserts, without any citation to the record, that "99.74% of the 13.5 million acre Navajo Reservation is held in trust for the Navajo Nation or individual tribal members by the United States." Resp. Br. at 13. The only record evidence regarding land holdings on the Reservation, however, shows that a more significant portion of the reservation is controlled by state or federal government entities, without even counting fee lands. See J.L.M. 183. Respondents overlook the fact that the federal government maintains five monuments and parks on the Reservation. *See* J.A. 64-65; *see also* Navajo Tax Commission Record, Taxpayers' Trial Ex. 5, at 127 (Navajo Nation Fax 93).

At the same time, the nature of the governmental power at issue here is quite different than in *Brendale*. In a zoning case like *Brendale*, there is a special need for a unitary solution: "[Z]oning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually —or more often unilaterally—destructive." 492 U.S. at 433. Such a consistent solution, however, is not necessary to preserve the efficacy of a tax scheme. It is quite possible to differentiate in tax treatment between differently situated taxpayers, and in fact, governments regularly make such distinctions. Indeed, in tribal tax cases, this Court has often permitted different tax treatment of differently situated individuals. *See, e.g., Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (upholding state tax, only to the extent applied to non-Indians). None of the facts or reasons supporting Justice Stevens' plurality opinion are present here.

B. Merrion Does Not Apply to Fee Land.

The Tribe and its amici also rely heavily upon *Merrion* and its predecessor, *Colville*, to justify the imposition of a tax on non-Indian fee land. But neither case can be so divorced from its context. As petitioner has noted, each case quotes the same language identifying both the status of the land and the nature of the transactions as critical to its delineation of tribal sovereignty: "The power to tax transactions *occurring on trust lands and significantly involving a tribe* or its members is a fundamental attribute of sovereignty. . . ." *Colville*, 447 U.S. at 152 (emphasis added); *see also Merrion*, 455 U.S. at 137. This language immediately precedes and qualifies *Merrion*'s references to the tribe's "general authority" to control economic activity and require tax payments. *Merrion*, 455 U.S. at 137.

This limitation of tribal taxing authority to tribal trust lands and to transactions involving the tribe makes sense. A tribe has an interest in assuring the economic development of its own lands and in promoting its transactions with

nonmembers. The tribe can be expected to balance these interests with the need to raise revenue whenever its seeks to impose a tax on nonmembers in either of these circumstances. The same dynamic does not apply, however, where the tribe seeks to impose a tax on non-Indians doing business with other non-Indians on their own land.

Both the Tribe and the United States argue that *Merrion* is applicable here because Atkinson Trading receives the "privilege" of conducting its business on the Reservation, to which the Tribe can attach its tax. *See* Resp. Br. at 15; U.S. Br. at 12. Both misconstrue the relevance of this Court's reference to "privileges" in *Merrion*. There, the non-Indian businesses benefited from a privilege *granted by the tribe*—that is, the right to enter *tribal lands* and to remove valuable minerals. Under those circumstances, it was reasonable for the tribe to have the power to place conditions relating to a privilege which it had granted. Thus, the Court concluded that the "tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax." 455 U.S. at 141-42. When, however, a nonmember does business on its own fee land, the right to do business is not a "privilege" granted by the Tribe, but is rather a right which flows from ownership of the land.[4]

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[4] This is especially true here, where the Trading Post was originally established on land *outside the Reservation*. The Trading Post was established in 1916, on non-reservation land south of the Little Colorado River. *See* J.A. 21. When Congress extended the Reservation eight miles further south to include the Trading Post in 1934, it guaranteed that "[a]ll valid rights . . . under the public land laws prior to the approval hereof . . . shall not be affected by this Act." Act of Congress of June 14, 1934, ch. 521, 48 Stat. 960. *See* Pet. App. 83a (1934 Act preserves "proprietary rights of fee holders"). Thus, the Trading Post has always had the right to conduct its business on its fee land.

Perhaps more to the point, these "privilege" arguments lose sight of the fact that it is the nonmember guests of the hotel who are responsible for paying the tax. Those guests are not granted any "privileges" from the Tribe by virtue of their overnight stay in the Trading Post's hotel. The guests have a right to traverse the Reservation on federal rights-of-way, to stay on fee land owned by non-Indians, and to purchase goods and services from those non-Indians. These activities cannot be controlled or limited by the Tribe. Thus, there is no privilege exercised by these nonmembers to which a tax may be attached as a condition. The "privilege" language of *Merrion* does not modify the basic framework of *Montana*, which requires a consensual relationship or a threat to tribal self-government for the exercise of sovereignty over non-Indians on fee land.

III. *MONTANA*'S EXCEPTIONS DO NOT APPLY

The Navajo Nation makes no attempt to fit this dispute within either of the *Montana* exceptions. In fact, neither exception applies in this case.

A. The Tax is Not Imposed on a "Consensual Relationship" with the Tribe.

Non-Indian Guests: The non-Indian guests at the hotel have no actual consensual relationships with the Tribe or its members. The guests do not enter into any contractual agreements with the Tribe in order to rent rooms at the hotel. As the district court properly concluded, "[N]o explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." Pet. App. 65a.

The Navajo Nation argues that the tax can be justified because non-Indian guests at the Trading Post "voluntarily put themselves in the position of possibly needing assistance

from Navajo government personnel." Resp. Br. at 15. As a practical matter, the record does not reflect a single instance of any guest at the hotel receiving assistance from Navajo Nation personnel. In any event, this Court has repeatedly rejected the notion that a nonmember enters any kind of relationship with a tribe simply by virtue of its presence on the reservation and the incumbent "possibility" of tribal services. *See* Pet. Br. at 34-36. Indeed, in *Strate*, nonmember traffic accidents on the reservation made likely the prospect of tribal services, including tribal police, but such a likelihood was not sufficient to support tribal jurisdiction. *See Strate*, 520 U.S. at 456-59 & n.11.[5]

The Navajo Nation and its amici rely on this Court's due process cases, which address when a state, which exercises fully territorial sovereignty, can tax an enterprise doing business within its territorial borders. *See* Resp. Br. at 21-22; Shakopee *Amici* Br. at 14. The due process cases have no application to the question of how an Indian tribe, a dependent sovereign whose governmental authority is limited to self-government, may gain power over nonmembers in the first instance. Moreover, *Montana*'s first exception makes no mention of principles of due process. If the Court had intended to apply that concept, it would have done so explicitly.

Nor is there anything unfair in concluding that the guests are not required to pay the tax. *See* Brief *Amici Curiae* of Assinboine and Sioux Tribes of the Fort Peck Indian Reservation *et al.* at 18 (tribal members "would be forced to pay the non-Indians' share"). The Navajo Nation provides services primarily to its own members. For example, the

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[5] The Tribe has the ability to charge a fee when it provides a specific service to a nonmember upon request, such as emergency ambulance services. *See* J.A. 127-29. It does not need to impose a tax based on the possibility of such services.

largest single use of general funds is its legislative fund. J.A. 121. In some cases, nonmembers are not even eligible for tribal programs, such as health programs. J.A. 112. If a nonmember guest at the hotel needs medical attention, the guest is referred outside the Reservation, because the Indian Health Service Facility in nearby Tuba City "is limited as to what they can do for nonmembers." J.A. 26.

Moreover, nonmembers already provide significant funding for services on the Reservation, by virtue of their status as state and federal taxpayers. They pay for the state and federal highways. They pay for state and local police and fire departments that serve portions of the Reservation, such as Cameron. *See* Pet. App. 57a-58a. They pay for the local elementary school in Cameron. J.A. 26, 50.

Even where the Tribe provides services, nonmembers are the source of vital funding. In the year in which the administrative record was compiled in this case, more than $174,000,000 (or nearly 62%) of the Navajo Nation's funding came from federal and state/private funding. J.A. 121. The federal government funds over 76% of the Navajo Nation Division of Health's budget, and over 81% of its Department of Public Safety (police services) budget. *Id.* In those limited circumstances where medical services are provided by the Tribe to nonmembers, "there is state and federal funding to cover the costs of providing those services . . . ." J.A. 112. It is thus hard to conclude that nonmembers do not pay their fair share of tribal expenses.

The absence of consensual relationships between the non-Indian guests and the Tribe determines this case. It is undisputed that the incidence of the tax falls on these guests. *See* 24 Navajo Tribal Code § 102. Indeed, the United States concedes this point in its brief. U.S. Br. at 19. Nevertheless, without a single supporting precedent, it invites this Court to disregard the legal incidence of the tax. That invitation is misguided. This Court has stated that the "dispositive

question" in Indian tax cases is who bears the legal incidence of the tax. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).[6] This "focus on a tax's legal incidence accommodates the reality that tax administration requires predictability." *Id.* at 459-60.[7]

The government argues that the Tribe *could have* written the law differently, to place the legal incidence of the tax upon the hotel. U.S. Br. at 20. This argument ignores this Court's guidance that it will give full effect to the legislatively-declared legal incidence of the tax. *See First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347-48 (1968) ("For our purposes . . . [legislative] intent is controlling."). Incidence is as important here as in other contexts. As the district court here acknowledged, "[b]y its very focus on the actions of the nonmembers over whom the tribe seeks jurisdiction, the *Montana* test seems to require application of the legal-incidence test." Pet. App. 59a. By disregarding incidence, the United States effectively asserts that the Tribe can tax nonmembers who have consensual relationships with other nonmembers who themselves have a purported consensual relationship with the Tribe. This is plainly not the holding of *Montana* and would work a vast and unjustified expansion of the rule of that case.

The Hotel: Even if the incidence of the tax fell upon the hotel, the record in this case demonstrates that the hotel also does not have a consensual relationship of the qualifying kind. The hotel purchases its electric, gas and telephone

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[6] *Accord Moe v. Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481-82 (1976); *see Colville*, 447 U.S. at 151 (describing holding of *Moe*); *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985).

[7] Courts have applied the legal incidence test in other contexts apart from tribal taxation. *See, e.g., United States v. State Tax Comm'n*, 421 U.S. 599 (1975); *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985).

services from non-Navajo sources. Pet. App. 93a.[8] It has contracted with a non-Navajo company for the disposal of its solid waste. *Id.* It does not purchase goods from the Tribe or its members. *Id.* In short, it does not have the commercial relationship necessary to support tribal taxation.[9]

Of course, given its location, the hotel does employ members of the Navajo Nation. But the tax at issue has nothing to do with that relationship. It is not a tax on employment of Indians, but a tax on the renting of rooms by non-Indians. In order to find a consensual relationship of the "qualifying kind" under *Montana* and *Strate*, however, there must not only be a relevant relationship between the nonmember and the tribe, but the tribal regulation or tax *must arise out of that specific relationship*. *See* Pet. Br. at 32-33. Even if the tax is viewed as imposed on the hotel, the tax does not meet that test.[10]

For the same reason, the United States' attempt to fit this dispute within *Montana*'s first exception must fail. The United States contends that Atkinson Trading has the

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[8] The hotel obtains its water from its own wells, operates its own sewer plant and returns the water in potable form to the Little Colorado River. J.A. 24-25, 39.

[9] Respondents seek to convert a statement that the Tribe is the primary provider of police services to the Cameron area into a finding that it is the primary provider of government services to the hotel. There is no such finding. The hotel depends upon the State of Arizona for a variety of functions, including highways, schools, utilities, fire protection and law enforcement. J.A. 21, 24, 26, 27, 49, 50. To the extent that law enforcement against tribal members in the Cameron area is necessarily handled by tribal police, *Strate* already holds that this is not a sufficient basis for the assertion of tribal sovereignty over nonmembers.

[10] Certain "relationships" pointed out by tribal amici are not relationships at all. It is implausible to suggest, for instance, that a consensual relationship with the Tribe exists merely by virtue of the fact that the Cameron Trading Post reflects Navajo culture or serves Navajo foods.

necessary consensual relationship with the Tribe by virtue of "accepting" its status as an Indian Trader under federal regulations. U.S. Br. at 17-18. Putting aside the fact that the license comes from the United States (and not the Tribe), this argument rests on a fundamental misunderstanding of the scope of the federal Indian trader statutes. Those statutes do not address the type of business conduct at issue in this case—trade wholly between nonmembers—but instead are limited in scope to on-reservation trade *with Indian tribes*. For instance, the Indian trader statutes grant authority to the Commissioner "to appoint traders *to the Indian tribes*." 25 U.S.C. § 261 (1994) (emphasis added). Again, in defining who must obtain a trading license, the statute limits its scope to "[a]ny person desiring to trade with the Indians . . . ." 25 U.S.C. § 262 (1994). Similarly, the implementing regulations relating to the Navajo Nation define their purpose as the "protection of Indian consumers" in their dealings with traders on the Reservation. 25 C.F.R. § 141.1.

Consequently, courts that have considered the issue have concluded that a business is an "Indian trader" only when conducting business with the tribes. *See, e.g., Arizona Dep't of Revenue v. Dillon*, 826 P.2d 1186, 1192 (Ariz. Ct. App. 1992) (on-reservation business "is not functioning as an 'Indian trader' within the federal licensing scheme when he sells cigarettes to non-Indians and nonmembers"). Thus, this Court has held that the preemptive scope of the regulatory scheme will preclude state taxes when an Indian trader is making sales to Indians, *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), but has no effect when the Indian trader is making sales to non-Indians. *Moe*, 425 U.S. at 482; *Department of Taxation & Fin. of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 74-75 (1994).

Given this limited scope of an Indian trader license, any taxes imposed on that basis must be commensurately limited. In *Strate*, this Court expressly refused to permit an exercise of

tribal jurisdiction where the non-Indian enterprise had a commercial contract with the tribe for work on tribal facilities. The Court held that the claim did not arise out of that contract. *Strate*, 520 U.S. at 457. Similarly, any taxes based on Atkinson Trading's Indian trader status must, at a minimum, arise out of its trade with the Indians. Thus, for instance, the Tribe might impose a tax on the Trading Post's sales to or purchases from the Tribe—transactions that relate to the purpose of the license. But those taxes may not be applied to transactions outside of the scope of the license, *i.e.*, transactions with nonmembers. The record here shows that less than 1% of the Trading Post's business involves transactions with tribal members. J.A. 50. These sales do not justify tribal taxes on the remaining 99% of sales to nonmembers.

Finally, respondents and their amici rely on older opinions such as *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), to argue that the mere privilege of doing business with the Tribe gives rise to the ability to tax. As already pointed out, much of the analysis in these cases is inconsistent with more modern principles of this Court. *See* Pet. Br. at 28-29 & n.19. Moreover, these cases are simply inapposite here. *Morris*, for instance, involved tribal power to charge a fee for the grazing of cattle on tribal lands. 194 U.S. at 384, 390. It has no application to a question of tribal authority over non-Indian fee land.

In *Buster*, the Tribe was also in a position to demand a licensing fee, due to specific congressional authorization. Consistent with an 1897 treaty, Congress had authorized the Creek Nation to enact ordinances dealing with a variety of subjects, with the proviso that any such ordinance could be valid only if approved by the President of the United States. 30 Stat. 495, 514, 518 (1898). The license fee at issue was

submitted to the President pursuant to that statute and approved in 1900. 135 F. at 949. "This law of the Creek Nation was in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation." *Id.* at 956.[11] In addition, the federal government had permitted the licensing fee to continue in a second treaty with the tribe that opened its lands to permanent settlement. *Id.* at 954. Nonmembers thus opened their businesses on the reservation with a federally-approved license fee in place.

Under those circumstances, where the tribal ordinance had already been authorized by act of Congress and the specific fee approved by the President, the tribe had retained its right to compel payment of the licensing fee, even from settlers who purchased their own lands. Those circumstances are clearly not present here. The Trading Post operated on fee land for decades before passage of the tax. No act of Congress authorized the Navajo Nation to enact its 1992 ordinance, nor was the specific tax approved by the Executive. Thus, even if the tax had been imposed on the hotel—which it plainly was not—cases like *Morris* and *Buster* would not provide a basis for it.

B. Montana's Second Exception Is Not Implicated in this Case.

Montana's second exception is designed to allow tribal regulation and taxation where nonmember conduct raises some threat to the tribe's ability to govern itself, *Strate*, 520 U.S. at 458-59, and where that threat is "demonstrably serious," *Brendale*, 492 U.S. at 431 (White, J.). In this case, it is telling that the Navajo Nation itself has not invoked the second exception.

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[11] *Cf.* 23 Op. Att'y Gen. 528, 528 (1901) ("By act of Congress, these [Cherokee] laws are first approved by the President. When so approved, they have, in all respects, the force and effect of laws.").

The Tribe argues instead that "[i]t simply does not make sense to expect the tribes to carry out governmental functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes, severance taxes, or hotel occupancy taxes." Resp. Br. at 16. If the need for tax revenues were sufficient to satisfy *Montana*'s second exception, then the tribes would have unfettered authority to tax non-Indians on their own lands, an "exception [that] would effectively swallow *Montana*'s main rule." *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000). But, more importantly, the Tribe's statement highlights the fact that it has numerous other sources of tax revenue, such as severance and leasehold taxes, that could appropriately be imposed on companies that do business with the Tribe. The necessity argument thus rings hollow.

The United States does not bother to argue necessity at all. It simply says that the hotel constitutes a valuable resource on the Reservation, which the Tribe is entitled to leverage and support by taxing its activities. However, the same rationale would have justified the exercise of tribal authority in *Montana* and *South Dakota v. Bourland,* 508 U.S. 679 (1993), since the use of the lands for hunting and fishing in those cases similarly was a valuable resource and may have caused some incremental costs for the tribes. What is missing here is any showing that these activities create a "demonstrably serious" threat to tribal survival or interfere directly with tribal self-government.[12]

In any event, this focus on taxation of the hotel avoids the question at hand, since the tax is imposed on the guests. No

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[12] The United States also argues that a "direct effect" on the Tribe is evidenced by the applicability of the Indian trader regulations. U.S. Br. at 22-23. Of course, transactions with Indians affect Indians as consumers—an impact that is regulated by the federal scheme. But this says nothing about the impact on a tribe of trading with non-Indians.

serious contention can be made that the renting of hotel rooms by those guests gives rise to a demonstrable threat to the Navajo Nation's power to govern itself. *Montana*'s second exception is not implicated here.

IV. CONGRESS HAS NOT EXPRESSLY AUTHORIZED THE NAVAJO TAX

Finally, the United States relies on specific provisions of the federal Indian trader regulations to suggest that the federal government has authorized the taxes at issue. However, the United States does not even address *Montana*'s requirement that any exercise of tribal sovereignty over nonmembers falling outside its exceptions must have "express authorization by federal statute or treaty." *Strate*, 520 U.S. at 445.

In *Montana*, this Court stated the basic principle that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without *express congressional delegation*." 450 U.S. at 564 (emphasis added). The Court defended this requirement of express congressional authorization in *Brendale*, 492 U.S. at 426 (Opinion of White, J.); emphasized this standard in *Bourland*, 508 U.S. at 695 n.15; and repeatedly invoked it in *Strate*, 520 U.S. at 445, 446. This standard assures that any exercise of tribal sovereignty over nonmembers in circumstances outside of the *Montana* rule will result from the express direction of an institution—Congress—that represents both members and nonmembers and has a constitutional role in dealing with the Indian tribes.

The regulations cited by the United States do not meet the "express congressional delegation" standard. In the first place, they are only regulations. They do not constitute a congressional delegation. The statutes pursuant to which they were promulgated make no delegation of any power to tribes, and therefore necessarily make no delegations to tribes of any

powers over nonmembers. They are easily contrasted with those statutes found to effect an express delegation. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 547 (1975); *Arizona Pub. Serv. v. EPA*, 211 F.3d 1280 (D. C. Cir. 2000).

In addition, the regulations themselves do not make an express delegation to the Navajo Nation of a power to tax the transactions of Indian traders with nonmembers on fee lands. The most pertinent regulation says only that these regulations are not intended "to preclude . . . such fees or taxes as [the Tribe] may deem appropriate," 25 C.F.R. § 141.11(a). This is a savings clause. It does not expressly authorize tribal taxes where they are not otherwise validly promulgated. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 162 (1920) ("usual function of a saving clause is to preserve something from immediate interference—not to create" new rights).[13] The regulations fail to meet the standard of clarity required for such "extraordinary" delegations. *See generally Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1217-20 (9th Cir. 2000).

In relying on insufficient regulations and irrelevant federal statutes, the United States "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation . . . .'" *Bourland*, 508 U.S. at 695 n.15 (quoting *Montana*, 450 U.S. at 564). The United States attempts to shoehorn its regulatory scheme into the consensual

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[13] The other regulations similarly fall short of an express authorization of the exercise of tribal sovereignty over sales to non-Indians. For example, a provision subjecting a license to "any clearance or tribal council approval *required by tribal or Federal regulations*," 25 C.F.R. § 141.6(b), contains no authorization of its own, but rather requires tribal approval only where otherwise required by other valid regulations. Even if it were self-executing, however, it would only require approval *to trade with the Tribe*.

relationship exception because it cannot meet the underlying requirement of express congressional delegation.

Of course, Congress retains the power to make a delegation of the power to tax non-Indians on fee lands. As this Court reasoned with respect to tribal sovereign immunity: "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area." *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 759 (1998) (citations omitted). Similarly, here, Congress can address the competing considerations and even place specific numerical limits on tribal taxes. Without that congressional approval, however, a closed tribal government should not be permitted to tax transactions among nonmembers on fee land.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, the decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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No. 00-454

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v.

JOE SHIRLEY, JR., ET AL.

ON WRIT OF CERTIORARI
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FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether the Navajo Nation may impose a hotel occupancy tax on non-Indian overnight guests at the Trading Post operated by petitioner on land it owns in fee, when the Trading Post is subject to federal regulations under the Indian Trader Statutes, petitioner's land is wholly surrounded by Indian lands on the Navajo Reservation, and petitioner and its guests receive necessary government services from the Navajo Nation.

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INTEREST OF THE UNITED STATES

The United States' interest in this case arises in part from the national government's special relationship with the Indian Tribes. The United States also has a direct interest in regulation of the reservation activities of non-Indians like petitioner, who are federally licensed to conduct business on Indian reservations. See 25 U.S.C. 261-264 (Indian Trader Statutes); 25 C.F.R. Pt. 141 (regulations governing business practices on the Navajo, Hopi, and Zuni Reservations).

STATEMENT

1. Petitioner Atkinson Trading Company is a New Mexico corporation that owns and operates the Cameron Trading Post, a complex of businesses including a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and recreational vehicle facility. Pet. App. 95a. The complex lies near Cameron, on the Navajo Indian Reservation within the borders of the State of Arizona, and it is used primarily by

tourists on their way to or from the Grand Canyon. *Id.* at 95a-96a. Atkinson owns the land underlying the complex in fee simple. *Id.* at 96a.

Petitioner's land has been within the boundaries of the Navajo Reservation at least since Congress confirmed those boundaries in 1934. See Act of June 14, 1934, ch. 521, 48 Stat. 960. It is entirely surrounded by tribal land. Pet. App. 96a. All travelers to and from the Cameron Trading Post cross the Reservation on state and federal highways constructed pursuant to rights-of-way granted by the Navajo Nation. *Ibid.* The Nation also provides municipal services (such as police and fire protection) to petitioner and its customers. *Id.* at 96a-98a. In the high season, petitioner has approximately 120 employees, about three-quarters of whom are members of the Nation. *Id.* at 96a.

2. In 1992, the Navajo Nation Council enacted a hotel occupancy tax applicable to all persons who pay for hotel rooms within the Reservation costing $2 or more per day. 24 Navajo Tribal Code § 102 (*reprinted in* Pet. App. 103a). The rate is eight percent of the price paid. Pet. App. 2a & n.1. Hotel operators must assess and collect the tax. *Id.* at 103a (§ 104). The Code declares that the tax, which is administered by the Navajo Tax Commission, is "imposed for the purposes of promoting tourism and tourism development" and is to be "applied for the advancement of local tourism promotion, and to develop projects throughout the Navajo Nation." *Id.* at 124a (§ 142).

Petitioner challenged the Navajo Nation's jurisdiction to enforce the hotel occupancy tax against petitioner and its guests. The Navajo Tax Commission received evidence, issued findings of fact and conclusions of law, and ruled against petitioner. Pet. App. 91a-101a. The Navajo Supreme Court affirmed. *Id.* at 70a-90a. Petitioner then sought relief in federal district court.

3. The district court granted summary judgment in favor of respondents. Pet. App. 53a-69a. Accepting facts found by the Navajo Tax Commission and not disputed by petitioner, the court recognized that its legal analysis should be based on the test articulated by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981), and *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997). Those cases recognize a general rule that Indian Tribes lack inherent sovereign power over nonmember activities on reservation land owned in fee by nonmembers, subject to exceptions for "nonmembers who enter consensual relationships with the tribe or its members" and for nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-566; see *Strate*, 520 U.S. at 445-447.

Because this case involves taxation, the district court also sought guidance from this Court's decision in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which discussed the scope of tribal taxing powers. The court stated:

> Where a tribe provides essential services within Indian Country, even to nonmembers and even on [nonmember-owned] fee land, and thus affords the "benefits of a civilized society" to those nonmembers, fairness indicates that it be allowed to impose taxes to help pay for those services. * * * The *Merrion* provision-of-services or benefits-of-a-civilized-society factors, thus, are relevant to the *Montana* test because they are indicators that the necessary consensual relationship is present to allow the tribe to impose a tax upon the fee-land activity.

Pet. App. 63a-64a. Even if such a consensual relationship was found, however, the court indicated that there was a further balancing of interests to be performed:

> The real question with respect to tribal-taxation cases and the consensual relationships test is whether the non-

> members' consensual activity within Indian Country is significant enough to allow the tribe to tax that activity. * * * [T]he extent to which a tribe will be allowed to regulate or affect non-Indian activity is often determined on a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction.

Id. at 64a.

Applying this analysis, the court first concluded that, despite the absence of any "explicit consensual relationship" between the Tribe and petitioner's guests, such a relationship is established within the meaning of *Montana* when those guests "travel onto the reservation, stay overnight, and take advantage of the establishment of a civilized society there." Pet. App. 65a. Second, the court concluded under its balancing test that "the presence of the guests creates a greater need, both actual and potential, for tribal services," such as medical, police, and fire services, and that the burden imposed by the tax is minimal. *Id.* at 66a-67a. The court accordingly held that the Navajo had the authority to impose its tax on petitioner's guests.

4. The court of appeals affirmed. Pet. App. 1a-51a. The court accepted the district court's application of the *Montana* test, which it concluded "appropriately appl[ied] and complement[ed] the Supreme Court's Indian law jurisprudence." *Id.* at 14a. It emphasized that the *Montana* analysis necessarily gives Tribes some regulatory power over nonmembers on their reservations, even on nomember-owned lands, and concluded that "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." *Id.* at 11a. The court also agreed that *Merrion* was highly relevant to the analysis, even though it dealt with tribal lands, because *Merrion*

characterized the power to tax as "an essential attribute of sovereignty," rather than simply "an extension of a tribe's power to exclude." *Id.* at 12a. The court also relied on 18 U.S.C. 1151, which defines "Indian country" to include all lands within the borders of a reservation (without regard to title), and *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), which upheld tribal taxation of a business on nonmember land. See Pet App. 14a-19a.

Particularly in light of this Court's citation of *Buster* in both *Montana* and *Strate*, the court of appeals concluded that this Court had not established "one rule for assertions of tribal jurisdiction on fee land (*Montana*, et al.) and another rule for tribal land (*Merrion*)." Pet. App. 15a. The court held instead that the fee status of land was only one factor in a case-by-case analysis "in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations," as the district court had held. *Id.* at 15a-18a; see also *id.* at 20a n.11 (fee status is relevant but not determinative). The court summarized:

> The primary considerations that the Supreme Court has taken into account in cases involving tribal jurisdiction and nonmembers on the reservation are (1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting to exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved. Any accounting of fee status either falls into the Court's study of these factors or becomes secondary.

Id. at 25a.

Applying this analytic framework, the court of appeals sustained the district court's judgment that the Navajo Nation could properly impose its occupancy tax on petitioner's guests under *Montana*'s exception for consensual relationships. The court noted that the guests travel over

reservation lands to reach the complex, and that they receive the benefit of "police, fire, emergency medical, and tourist services provided by the tribe," which constitute the "benefits of a civilized society" mentioned in *Merrion*. Pet. App. 26a-30a. It concluded that "[t]he consensual relationship between the guests and the tribe is one of implied consent, or privilege and tax, similar to that set forth in *Buster*: the consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability for the Navajo Hotel Occupancy Tax." *Id.* at 29a. Having found such a consensual relationship, the court applied its balancing test and held that the tax burden on the guests was "not disproportionate to the benefits they receive by availing themselves of Navajo tribal services." *Id.* at 30a-32a. It accordingly affirmed the district court's judgment sustaining the tax.

Judge Briscoe dissented. Pet. App. 33a-51a. She found the majority's interpretation of *Montana* flawed, principally because it discounted the importance of fee ownership. See *id.* at 37a-42a. In her view, "*Montana* operates from a presumption that * * * a tribe lacks jurisdiction over nonmembers' conduct on nonmember fee land," while "*Merrion* operates from a presumption that a tribe retains inherent sovereign authority to regulate nonmembers' conduct occurring on tribal land." *Id.* at 41a-42a. Applying what she considered to be *Montana*'s analysis, without reference to factors from *Merrion*, she concluded that the Navajo Nation does not have inherent authority to impose its tax under the "consensual relationships" exception, because any consent by petitioner was irrelevant to a tax imposed on hotel guests, and because there was insufficient evidence in the record to show that petitioner's guests entered into "a consensual relationship, either express or implied," with the Tribe. *Id.* at 44a-48a. Judge Briscoe also rejected application of the

second *Montana* exception, because in her view there was no evidence "that the conduct, or even the mere presence, of [petitioner's] non-Indian guests represents a threat to, or has a direct effect on, the Nation's political integrity, economic security, or health and welfare." *Id.* at 50a; see also *id.* at 48a-51a.

SUMMARY OF ARGUMENT

The tax at issue in this case is imposed on commercial transactions between nonmembers of the Navajo Nation, occurring on land that is located within the Navajo Reservation, but that is held in fee by a nonmember of the Tribe. The Tribe's power to impose such a tax must be evaluated in light of this Court's decisions addressing both tribal taxing authority specifically and tribal civil authority over nonmembers more generally.

The Court has made clear that Indian Tribes possess an inherent power to tax. Under the Court's decisions and longstanding federal policy, that power extends to nonmembers of a Tribe, even on nonmember fee land within a reservation, to the extent they enjoy privileges of trade or other activity to which the Tribe can attach a tax.

This Court's decisions in *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981), and *Strate* v. *A-1 Contractors*, 520 U.S. 438, 446 (1997), hold that a Tribe may tax or regulate the activities of nonmembers on nonmember fee land within a reservation if the nonmembers enter "consensual relationships with the tribe or its members," or if their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." In the particular circumstances of this case, the Navajo Nation's hotel occupancy tax is valid under both those tests.

Petitioner itself has, for *Montana* purposes, entered into a "consensual relationship" with the Navajo Nation by conducting a substantial business within the boundaries of the

Tribe's Reservation, under regulations issued by the Secretary of the Interior that afford the Tribe the opportunity to play a substantial role in regulating that business. By applying for and accepting a federal Indian Trader's license under those regulations, petitioner has accepted privileges of trade to which the Tribe may attach a tax. That conclusion supports the tax here, even though the Navajo tax is formally assessed against petitioner's customers, rather than against petitioner itself.

The Tribe's modest occupancy tax is also valid under *Montana*'s second test. Petitioner's business is subject to comprehensive federal regulations, enforceable by the Tribe, that reflect a conclusion by the Secretary of the Interior that petitioner's operations do have a direct effect on the Tribe and its members. The commercial transactions to which the Navajo tax applies take place on nonmember fee land that is completely surrounded by tribal lands, so that apparently all or almost all other commercial and residential property in the immediate community is subject to full tribal jurisdiction. And those nonmember transactions have, in the aggregate, foreseeable consequences that require attention and response from the Tribe's government. Under those circumstances, the Tribe's tax "does not reach beyond what is necessary to protect tribal self-government," *Strate*, 520 U.S. at 459 (bracket and citations omitted), and it should be sustained as a reasonable exercise of the Tribe's limited but important civil authority over the conduct of nonmembers on nonmember fee lands within its Reservation.

ARGUMENT

IMPOSITION OF THE NAVAJO HOTEL OCCUPANCY TAX ON PETITIONER AND ITS CUSTOMERS IS A REASONABLE EXERCISE OF THE TRIBE'S SOVEREIGN POWER

A. *Montana* And *Strate* Provide The Proper Framework For Analysis

The occupancy tax at issue in this case is imposed on the purchase of overnight lodging at any hotel, including petitioner's, that is located within the territorial boundaries of the Navajo Nation. Pet. App. 2a, 103a. Petitioner's hotel is built on land located within the boundaries of the Nation (and the State of Arizona), but held in fee simple by petitioner, a New Mexico corporation that is owned and run by individuals who are not members of the Navajo Nation. See *id.* at 2a, 95a-96a. The validity of the hotel occupancy tax, as applied to petitioner's business establishment, must be evaluated in light of this Court's decisions specifically addressing the inherent powers of an Indian Tribe to tax—including a Tribe's power to tax non-Indians within its reservation in appropriate circumstances—as well as the Court's decisions addressing more generally a Tribe's authority to exercise civil jurisdiction over the activities of nonmembers on nonmember fee land within the reservation.

1. This Court has made clear that Indian Tribes possess an inherent power to tax that has not been divested by the United States. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980). "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

In 1934, Congress enacted the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, which, in Section 16, provides that an Indian Tribe may elect to organize under that Act and provide in its constitution for the exercise of "all powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C. 476(e). Immediately after passage of the Act, the Solicitor of the Department of the Interior, in his seminal opinion entitled *Powers of Indian Tribes*, 55 Interior Dec. 14 (1934), interpreted the quoted phrase in Section 16 of the IRA to confirm in Tribes "the whole body of tribal powers which courts and Congress alike have recognized as properly wielded by Indian tribes, whether by virtue of specific statutory grants of power or by virtue of the original sovereignty of the tribe insofar as such sovereignty has not been curtailed by restrictive legislation or surrendered by treaties." *Id.* at 18.[1] With respect to the power to tax, the Solicitor stated, in a paragraph this Court quoted with approval in *Colville*:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

447 U.S. at 153 (quoting 55 Interior Dec. at 46) (emphasis added by the Court); see also *Merrion*, 455 U.S. at 139 (quoting from same passage in Solicitor's opinion).

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[1] Although the Navajo Nation is not organized under the IRA, it possesses the same inherent governmental powers—including the power to tax non-Indians—as Tribes that are organized under that Act. See *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195 (1985); see also 25 U.S.C. 476(f)-(g).

The Court explained in *Merrion* that a Tribe's power to tax non-Indians on its reservation "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." 455 U.S. at 137 (citing *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824)). For Indian Tribes, as for States, "[t]he power of taxation is indispensable to their existence" as independent entities. *Gibbons*, 22 U.S. (9 Wheat.) at 199.

Although *Merrion* itself involved taxation of non-Indian activities on land held in trust for the Tribe, the Court, in rejecting the proposition that a Tribe's power to tax derives solely from its power to exclude non-Indians,[2] discussed at some length the decision in *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), which involved a Tribe's taxation of a non-Indian business on non-Indian fee land. The Court explained:

> [T]he decision in *Buster* v. *Wright* actually undermines the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands. Under this theory, a non-Indian who establishes lawful presence in Indian territory could avoid paying a tribal tax by claiming that no residual portion of the power to exclude supports the tax. This result was explicitly rejected in *Buster* v. *Wright*. In *Buster*, deeds to individual lots in Indian territory had been granted to non-Indian residents, and cities and towns had been incorpo-

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[2] The Court addressed the power to exclude as a basis for taxation because the non-Indian argued that the Tribe had relinquished any power to exclude it from tribal lands when the Tribe entered into a long-term lease of tribal lands with the non-Indian for production of oil and gas, and had relinquished its power to tax as a result. See 455 U.S. at 141-143, 144-145.

> rated. As a result, Congress had expressly prohibited the Tribe from removing these non-Indian residents. Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained the power to tax. The court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.*" 135 F. at 952 (emphasis added).

455 U.S. at 143-144 (footnote omitted). See also *Colville*, 447 U.S. at 153 (including *Buster* v. *Wright* among cases cited for the proposition that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity"); 55 Interior Dec. at 46-48 (extensively discussing *Buster* in support of the statement, quoted at page 10 above, concerning a Tribe's inherent power to tax); *Merrion*, 455 U.S. at 144 n.8 (citing F. Cohen, *Handbook of Federal Indian Law* 142 (1942), for its discussion of *Buster*).

This is not to say, of course, that a Tribe has plenary power to tax non-Indians on its reservation, at least on lands owned in fee by non-Indians. Rather, as the Court explained in *Merrion*, echoing the opinion of the Solicitor of the Department of the Interior, cases such as *Buster* v. *Wright* "demonstrate that a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax." 455 U.S. at 141-142. Accordingly, the circumstances in which a Tribe may assess a tax against non-Indians on a reservation must be evaluated under the

general framework established by this Court for the exercise of civil authority over non-Indians on a reservation, albeit with an appreciation of the requirements of an Indian Tribe, like any sovereign, to raise revenue to support essential services that are furnished to the reservation community—including, in some instances, to non-Indians who are in that community.

2. Two of this Court's cases set out the central principles relevant to determining more generally whether an Indian Tribe may exercise civil authority over the activities of nonmembers on nonmember fee land within the Tribe's reservation. In *Montana* v. *United States*, 450 U.S. 544, 563-567 (1981), the Court held that a Tribe did not have inherent sovereign authority to regulate hunting and fishing by nonmembers on nonmember fee land. Concluding that the regulation of such activities on nonmember land bore "no clear relationship to tribal self-government or internal relations," the Court endorsed "the general proposition that the inherent sovereign powers of an Indian tribe do not extend" that far. *Id.* at 564-565. The Court recognized, however, two exceptions to that general principle. First, a Tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. Second, a Tribe retains "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

In *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), the Court relied on *Montana* in holding that a Tribe had no inherent jurisdiction to adjudicate a civil claim brought by one nonmember against another nonmember arising out of an accident that occurred on a state highway right-of-way,

which the Court assimilated, for this purpose, to nonmember fee land. See *id.* at 442, 456. The Court concluded that, as to nonmembers, the Tribe's adjudicative jurisdiction did not exceed its legislative jurisdiction, and it confirmed that, in the absence of a controlling treaty or federal law, *Montana*'s general rule and exceptions "delineate[] * * * the bounds of the power tribes retain" to exercise civil authority over nonmembers' activities on nonmember fee lands within a reservation. *Id.* at 453.

The *Strate* Court concluded that neither of the *Montana* exceptions applied to the situation at issue in *Strate*. As to the first exception, the Court held that a lawsuit between "two non-Indians involved in [a] run-of-the-mill [highway] accident" on a state right-of-way did not involve any "'consensual relationship' of the qualifying kind," but was "distinctly non-tribal in nature." 520 U.S. at 457.[3] As to the second exception, the Court interpreted *Montana* to hold that "a tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* at 459 (brackets omitted) (quoting *Montana*, 450 U.S. at 564). A nonmember's careless driving on the state highway, the Court reasoned, did not have such a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe" that denial of jurisdiction over a resulting lawsuit would "trench unduly on tribal self-government" or interfere impermissibly with "the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 457-459 (in part quoting *Montana*, 450 U.S. at 566, and *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)).

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[3] Compare *United States* v. *McBratney*, 104 U.S. 621 (1881) (State, rather than United States, has jurisdiction to prosecute criminal offense committed by one non-Indian against another non-Indian in Indian country).

In the present case, the court of appeals recognized the central relevance of *Montana* and *Strate*. See, *e.g.*, Pet. App. 24a. Its discussion, however, appears to blur the distinction this Court has consistently drawn, in cases involving the exercise of tribal jurisdiction over nonmembers, between nonmember fee land and other reservation lands. See, *e.g.*, *id.* at 19a-20a & n.11. If petitioner's hotel were *not* located on fee land, there would be no question that both petitioner and its guests were subject to taxation (and other regulation) by the Tribe. See, *e.g.*, *Strate*, 520 U.S. at 454 & n.8; *Montana*, 450 U.S. at 557; *Merrion*, 455 U.S. at 136-148; *Colville*, 447 U.S. at 152-154; cf. *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 330-343 (1983). Accordingly, and contrary to the court of appeals' view, the fact that petitioner holds its land in fee is not "largely inconsequential in this case." Pet. App. 20a n.11. It is, instead, one of the two key factors—the other being that the Tribe's tax falls on nonmembers—that make it necessary to assess the validity of the tax using the test set out in *Montana* and *Strate*.

B. In The Particular Circumstances Of This Case, The Navajo Tax Is A Proper Exercise Of Tribal Jurisdiction Under Both Of The *Montana* Exceptions

The district court and the court of appeals sustained the Navajo Nation's occupancy tax on the basis of *Montana*'s recognition of tribal authority over situations in which nonmembers have entered into some sort of consensual relationship with a Tribe or its members. See Pet. App. 11a n.8, 32a, 63a-68a & n.28. The Navajo Supreme Court upheld the tax both on that ground (*id.* at 83a-87a) and on the basis of *Montana*'s second exception, for nonmember conduct that threatens or has a "direct effect" on the political integrity, economic security, or health and welfare of the Tribe (see *id.* at 88a-89a). Under the circumstances presented by this case, including in particular the regulatory regime that governs

petitioner's business, which was adopted by the Secretary of the Interior under the Indian Trader Statutes, we believe that the tax may be sustained under both of the *Montana* exceptions.

1. In View Of Federal Regulations That Govern Petitioner's Business, The Tax Is Valid Under *Montana*'s First Exception As A Condition On The Privilege Of Engaging In Commercial Transactions At Petitioner's Trading Post

a. Petitioner itself has, for *Montana* purposes, entered into a "consensual relationship" with the Navajo Nation by conducting a substantial business within the boundaries of the Navajo Reservation under regulations issued by the Secretary of the Interior that afford the Navajo Nation the opportunity for a substantial role in the regulation of petitioner's business.

In both *Montana* and *Strate*, this Court specifically cited *Buster* v. *Wright* as an example of situations that fall within the first *Montana* exception. See 450 U.S. at 566; 520 U.S. at 457. As it had done in *Merrion* (see pp. 11-12, *supra*), the Court in *Strate* explained that *Buster* upheld a Tribe's "permit tax on nonmembers for the privilege of conducting business within [the] Tribe's borders," and "characterized as 'inherent' the Tribe's 'authority . . . to prescribe the terms upon which noncitizens may transact business within its borders.'" 520 U.S. at 457 (quoting *Buster*, 135 F. at 950); see also *Williams*, 358 U.S. at 223; *Morris* v. *Hitchcock*, 194 U.S. 384, 391-393 (1904); compare *Merrion*, 455 U.S. at 145 n.11 (quoting *Buster*, 135 F. at 958: "The ultimate conclusion * * * is that purchasers of lots * * * within the original limits of the Creek Nation * * * are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns[.]").

There is no occasion here to identify as a general matter the circumstances in which the ability of a non-Indian to engage in business on non-Indian fee land on a reservation may properly be regarded as the acceptance of a privilege to trade that triggers the Tribe's inherent power to tax non-Indians under the first *Montana* exception. In this case, those circumstances are established by a special regulatory regime that has been established by the Secretary of the Interior for the Navajo, Hopi, and Zuni Reservations under the Indian Trader Statutes, 25 U.S.C. 261-264. See 25 C.F.R. Pt. 141.[4] As this Court pointed out in *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61 (1994), "[t]hroughout this Nation's history, Congress has authorized 'sweeping' and 'comprehensive federal regulation' over persons who wish to trade with Indians and Indian tribes." *Id.* at 70 (quoting *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 687-689 (1965)); accord *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980). Under that regulatory regime, petitioner (or any other nonmember-owned business) may offer goods and services for retail sale on the Navajo Reservation only if it has been licensed to do so. See 25 C.F.R. 141.1, 141.2, 141.3(*l*), 141.5(a); Parties' Joint Lodging Materials 163 (petitioner's federal license). Application of those regulations to petitioner was upheld in *Ashcroft* v. *United States Department of the Interior*, 679 F.2d 196, 200 (9th Cir. 1982), cert. denied, 459 U.S. 1201 (1983), against a challenge by petitioner and other Indian Traders based on the nature and history of their land and the relative volume of their business with non-Indians. As interpreted in *Ashcroft*, the

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[4] We also note that although petitioner's customers are primarily tourists, petitioner engages in substantial direct consensual relationships with members of the Tribe in the form of employment. See Pet. App. 56a-57a, 72a; J.A. 52-53.

regulations reflect a determination that all nonmembers who engage in retail businesses on the Navajo Reservation, even on fee land and even predominantly with other nonmembers, have a sufficient nexus with the Tribe and its members in the conduct of their businesses to warrant comprehensive regulation under the Indian Trader statutes. See *id.* at 200 n.3.

Anyone seeking to obtain or renew a license under the regulations must first obtain "any clearance or tribal council approval required by tribal or Federal regulations." 25 C.F.R. 141.6(b), 141.9(d). The regulations require licensed businesses to comply with tribal health regulations and standards for weights and measures, and to make themselves available semi-annually at meetings of the Tribe's governing body. 25 C.F.R. 141.17, 141.22. They prohibit a licensee from selling or leasing a building without the consent of both the Bureau of Indian Affairs and the Tribe. 25 C.F.R. 141.22. The regulations expressly contemplate direct "tribal enforcement of the[] regulations [themselves] or consistent tribal ordinances." 25 C.F.R. 141.11; compare *United States* v. *Mazurie*, 419 U.S. 544, 553-559 (1975) (discussing delegation to tribal government of federal power over fee land on reservation). And the regulations specifically "do not preclude the Hopi, Navajo, or Zuni tribal councils from assessing and collecting such fees or taxes as they may deem appropriate from reservation businesses." 25 C.F.R. 141.11; compare *Warren Trading Post*, 380 U.S. at 689-690 (describing a similar regulation as an order by the Secretary of the Interior that "the governing body of an Indian reservation may assess from a trader 'such fees, etc., as it may deem appropriate'" (quoting 25 C.F.R. 252.27c (1964 ed.))). Moreover, in the federal license itself, the licensee "expressly warrants that all applicable Federal, State and Tribal laws and regulations will be fully complied with in all respects." Parties' Joint Lodging Materials 163.

By applying for and accepting an Indian Trader's license under these regulations, with their provisions for the Tribe to have an extensive role, petitioner has "accept[ed] privileges of trade" on the Reservation "to which taxes may be attached as conditions" by the Tribe. *Colville*, 447 U.S. at 153 (quoting *Powers of Indian Tribes*, 55 Interior Dec. at 46). Petitioner's voluntary submission to this regulatory regime gives rise to a "consensual relationship" with the Navajo Nation within the meaning of the *Montana* test. Petitioner's operations are accordingly subject to tribal regulation, including taxation, under the first *Montana* exception.

b. We do not believe that the first *Montana* exception is rendered inapplicable here simply because the occupancy tax is assessed against customers who stay at petitioner's Trading Post, rather than against petitioner itself. See Pet. App. 103a (§ 102(A)).[5]

First, in *Buster*, the court referred to the power of the Tribe "to prescribe the terms upon which noncitizens may transact business within its borders," 135 F. at 950, not merely to the power of the Tribe to tax the owner of the business itself. Because petitioner's business establishment as a whole is brought within the first *Montana* exception under the special Indian Trader regulations discussed above, the Tribe's authority to tax encompasses the power to tax the transactions that take place in the course of petitioner's business. By the same token, because the presence and operation of petitioner's business on the Reservation is contingent upon compliance with the governing regulations, including those providing a role for the Navajo Nation, petitioner's customers, like petitioner itself, are properly regarded as having "accept[ed] privileges of trade" on the

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[5] The Code requires petitioner to "collect for the [Navajo Tax] Commission the tax that is imposed" on its customers. Pet. App. 103a (§ 104).

Reservation "to which taxes may be attached as conditions" by the Navajo Nation. *Colville*, 447 U.S. at 153 (quoting *Powers of Indian Tribes*, 55 Interior Dec. at 46).

Second, it is in any event clear that petitioner itself could be subjected to a tax by the Navajo Nation, in an amount equal to eight percent of the amount charged to each guest who stayed there.[6] The tax at issue in this case—assessed against petitioner's customers and collected by petitioner—is the functional equivalent of such a tax, and there is no reason why, for purposes of *Montana*'s first exception, it should be treated differently. To be sure, in other contexts this Court has given dispositive significance to the legal incidence of a tax. In particular, when the fundamental principle of immunity of Indians from state taxation is at stake, the Court has held that a State may not levy a tax directly on an Indian Tribe or its members inside Indian country, even though the State could achieve a functionally equivalent result by amending its law to change the tax's legal incidence. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457-460 (1995). But there are special reasons for attending to form as well as substance where that immunity principle is concerned, because the Court's cases have made clear that the historic doctrine of Indian tax immunity is absolute. See, *e.g.*, *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764-765 (1985). As the existence of the *Montana* exceptions makes clear, the "general rule" (see *Strate*, 520 U.S. at 446) that nonmembers are not subject to tribal taxes is *not* similarly absolute. In applying those exceptions, therefore, a "cate-

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[6] The court of appeals gave little consideration to whether the Tribe could tax petitioner itself under the first *Montana* exception. The court concluded that there was a sufficient consensual relationship between the guests and the Tribe to allow that tax. Pet. App. 26a-32a. The court simply noted that, to the extent it might be relevant, the existence of a consensual relationship with petitioner would follow *a fortiori*. *Id.* at 25a n.12.

gorical" approach to legal incidence is out of place. See *Oklahoma Tax Comm'n*, 515 U.S. at 458.

2. The Navajo Hotel Occupancy Tax Also Is Valid Under The Second *Montana* Exception Based On The Governing Regulations And The Direct Effect Of Petitioner's Business On The Navajo Nation

Under the second *Montana* exception, a Tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. Here, the particular "civil authority" the Navajo Nation exercises is the power to assess a tax, at the modest rate of eight percent of the room charge, on each guest who stays at petitioner's Trading Post. That tax reflects a reasonable effort by the Navajo Nation to obtain support for the government that provides necessary services to petitioner's Trading Post business and its customers who stay overnight on the Reservation. Because the tax is assessed on the amount paid for nights actually spent on the Reservation, it is reasonably calibrated to the impact that petitioner's business has on the community and the responsibility that petitioner and its guests may reasonably be expected to bear for the support of the Navajo Nation, which provides not only tourist services and promotion (to which the proceeds of the hotel occupancy tax are devoted), but also "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445 (1979)); see *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626-627, 628-629 (1981).

Although *Montana* and *Strate* provide the proper framework for analysis here, there are at least three material

differences between the hotel occupancy tax imposed on petitioner's guests and the hunting regulations and tort suit that the Court considered in those cases. Those differences justify the exercise of tribal jurisdiction under *Montana*'s "direct effects" test.

First, petitioner's business is subject to comprehensive regulations issued by the Secretary of the Interior, and subject to enforcement by the Tribe, based on petitioner's commercial relationship with the Navajo Nation and its members. Second, the nonmember fee land at issue here is located in an area of the Reservation where both the land and the population are overwhelmingly Navajo, and is completely surrounded by tribal lands that are unquestionably subject to the Navajo government's civil jurisdiction. Third, the nonmember conduct that the Tribe seeks to tax involves commercial transactions routinely entered into at petitioner's fixed place of business on the Tribe's Reservation—transactions that, in the aggregate, have foreseeable consequences for the Tribe's government, for other individuals and enterprises in the local area, and for the local environment. Denying the Navajo any authority to tax (or otherwise regulate) that sort of nonmember activity, on nonmember land that is situated like petitioner's, would indeed leave the Tribe without even the residuum of sovereign power that is "necessary to protect tribal self-government or to control internal relations," and thereby "directly affect[] the tribe's political integrity, economic security, health, or welfare." *Strate*, 520 U.S. at 446, 459 (in part quoting *Montana*, 450 U.S. at 564).

a. *Indian Trader regulations.* The second *Montana* exception is designed to identify those situations in which there is a sufficient justification for the exercise of tribal civil authority over the conduct of non-Indians because of the "direct effect" that conduct may have on the political integrity, economic security, and health or welfare of the Tribe.

Here, the Secretary of the Interior, exercising authority conferred by Congress under the Indian Trader Statutes, has concluded that petitioner's business operations do have a direct effect on the Navajo Nation and its members, and has issued regulations that govern that relationship and afford the Navajo Nation an opportunity for a significant role in the regulation of petitioner's business. See pp. 17-18, *supra*. That conclusion is material to the *Montana* analysis, in light of the Secretary's responsibility for the administration of the Indian Trader Statutes and for Indian affairs generally.

b. *Character of the nonmember land.* Petitioner's "nonmember fee land," on which its hotel and other Trading Post facilities are located, is completely surrounded by tribal trust lands. Pet. App. 96a. In 1990, all but 24 of the 1035 residents of the Reservation's Cameron Chapter were Indians. Parties' Joint Lodging Materials 181. Thus, although it is true that petitioner owns its land in fee simple, it is also apparently true that the Navajo Nation exercises essentially plenary civil jurisdiction over all or almost all other land, businesses, and residents in the area of the reservation surrounding petitioner's enclave. Compare *Montana*, 450 U.S. at 548 (28% of reservation in question was held in fee by non-Indians).

That fact is significant in evaluating the "direct effect" that petitioner's activities, and the visits of its thousands of overnight hotel guests, have on the Navajo Nation and its members. See *Montana*, 450 U.S. at 566. In *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 433-444 (1989) (opinion of Stevens, J., announcing the judgment of the Court in No. 87-1622), the Court upheld a Tribe's power to apply its zoning regulations to nonmember fee land in an area of its reservation that was still overwhelmingly tribal in land status and character. Contrasting that area, "in which only a very small percentage of the land [was] held in fee," with another area "in

which approximately half of the land [was] held in fee," Justices Stevens and O'Connor concluded that it was "inconceivable that Congress would have intended," when it adopted policies that led to varied ownership, "that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community." *Id.* at 437 & n.2; see also *id.* at 442 ("[I]t is enough to recognize that notwithstanding the transfer of a small percentage of allotted land the Tribe retains its legitimate interest in the preservation of the character of the reservation.").[7] Because petitioner's parcel is apparently the only nonmember fee land in the Cameron area, a similar analysis is appropriate here.

The ability to regulate and tax all local businesses on a non-discriminatory basis is important if a local government is to operate effectively and fairly. Exempting one business in an area, or its patrons, from reasonable local taxes on commercial transactions, solely on the basis that it sits on an "island" of fee land within a reservation, makes no more sense than allowing the holders of a few scattered parcels to develop their land "without regard to an otherwise common scheme." *Brendale*, 492 U.S. at 441 (opinion of Stevens, J.).[8]

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[7] Justice Stevens' opinion for himself and Justice O'Connor controlled the judgments of the Court in *Brendale* and the cases decided with it. Three other Justices would have held that the Tribe could enforce its zoning regulations throughout the reservation, while four would have held that the Tribe could not zone any nonmember fee land. Justices Stevens and O'Connor concluded that the Tribe had the power to zone in the area of the reservation that retained its tribal character, but not in an area where there was widespread nonmember ownership. See *Strate*, 520 U.S. at 447 n.6 (describing *Brendale*).

[8] Here, the Tribe seeks only to impose a nondiscriminatory tax, uniform across its Reservation; as in *Brendale*, "[i]t is [petitioner] who seeks a special, privileged status." 492 U.S. at 443. And here, as in *Brendale*, there is no allegation that collection of the Tribe's modest tax "interfere[s] with any significant state or county interest." *Id.* at 444.

Indeed, it would impose a direct disadvantage on tribal businesses, or nonmember businesses operating on tribal land, within the Tribe's own Reservation. Endorsing such an exemption would interfere materially with "the right of reservation Indians to make their own laws and be ruled by them." *Strate*, 520 U.S. at 459 (quoting *Williams*, 358 U.S. at 220); see *Brendale*, 492 U.S. at 443-444 (opinion of Stevens, J.) (concluding that recognition of tribal zoning authority in heavily Indian areas was consistent with *Montana*'s second test).

c. *Nature of the nonmember conduct.* The nonmember activities at issue in this case are also distinctly different from those at issue in *Montana* and *Strate*. *Montana* invalidated tribal regulations that sought to ban or severely restrict nonmember hunting and fishing on private lands within a reservation. See 450 U.S. at 549-550. *Strate* held that tribal courts could not exercise jurisdiction over a claim against a nonmember defendant arising out of an accident between nonmembers on a state right-of-way. See 520 U.S. at 442. In this case, by contrast, the nonmember conduct that the Tribe seeks to tax is the routine commercial purchase of overnight lodging in a tourist hotel permanently situated at a strategic point on the Tribe's Reservation.

Petitioner's hotel attracts a substantial number of tourist guests to the Navajo Reservation—in part by stressing the Cameron Trading Post's long history as a point of contact with the Navajo Nation and its members. See, *e.g.*, Pet. App. 72a-73a; *Manygoats* v. *Cameron Trading Post*, No. SC-CV-50-98 (Navajo Sup. Ct. Jan. 14, 2000), slip op. 2-3, 4-9.[9]

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[9] We are informed that the volume of the Navajo Reporter that will contain this case has not yet been published. For the Court's convenience, we have lodged a copy of the slip opinion with the Clerk. See also www.camerontradingpost.com/history.htm (visited Feb. 13, 2001) (italics omitted):

That is not a bad thing: Petitioner's Trading Post is, for example, the Cameron area's primary employer. See Pet. App. 96a (petitioner has approximately 120 employees, 75-80% of whom are tribal members); *Manygoats*, slip op. 3. Nevertheless, the comings, goings, and overnight stays of the thousands of guests petitioner hosts each year give rise to a foreseeable set of issues of legitimate concern to the tribal government.

On one hand, precisely because petitioner's tourist business is a valuable local economic resource, the Tribe has an interest in supporting and leveraging petitioner's efforts. With appropriate resources, it could do so by, for example, providing clean, safe, and attractive rest stops at appropriate places on the Reservation; providing convenient facilities for local merchants to sell tribal crafts, souvenirs, or other items; or providing information about local attractions that might induce tourists to prolong or repeat their stays. See, *e.g.*, Pet. App. 124a (provision of Navajo Code specifying that proceeds from hotel occupancy tax are to be "applied for the advancement of local tourism promotion"); J.A. 63-66, 70-75 (testimony of Tribe's Director of Tourism).

On the other hand, petitioner's hotel guests impose some actual or potential burdens on the local government. They

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> Visitors see firsthand a way of life that has changed little over the years - locals hauling water, trading for goods, buying feed and visiting with friends from the far corners of the reservation. * * * "What makes Cameron special," says Joe Atkinson [petitioner's President, see J.A. 20], "is not only the fine weavings, baskets and beadwork—it's the ambiance. Here you're not just told about the people, their traditions and what trading post life is like. You experience it!"

See also G. Richardson, *Navajo Trader* 142 (1986) (relating author's experiences at petitioner's Cameron Trading Post in earlier days) ("Tourists off the highway were over-filled with curiosity in those days, just as they are now - especially about Indians and anyone working stock.").

demand part of the 22 million gallons of water that petitioner pumps each year from wells on its land (and therefore on the Reservation). J.A. 24-25, 39. They generate wastewater, which petitioner treats in a plant on its property and then discharges into the Little Colorado River, which flows through the Reservation. J.A. 25, 39-40, 49. They generate trash and garbage, which was disposed of on the Reservation until that landfill was closed, and petitioner began having it hauled away. J.A. 40-41. They incrementally increase the local demand for basic government services, such as police and fire protection, highway patrols, and emergency medical assistance. See, *e.g.*, Pet. App. 57a-58a.[10] Given the limited pool of resources available to all governments, including the Navajo Nation, providing those resources to petitioner and its guests necessarily requires the Nation either to develop additional resources, or to divert existing resources away from the provision of services directly to tribal members. Finally, petitioner's guests support petitioner's business, which in turn entails tribal government attention to matters such as employment, health, and environmental regulation.

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[10] Because of the framework of criminal jurisdiction in "Indian country," see 18 U.S.C. 1151, the Navajo Nation has exclusive jurisdiction to arrest and prosecute offenses between Indians and victimless offenses by Indians. See 18 U.S.C. 1152; see also 18 U.S.C. 1153 (federal jurisdiction over all major crimes committed by Indians). The Nation's government is thus the only one with authority to prosecute a host of offenses that may occur on petitioner's premises, including minor crimes committed by one of petitioner's Indian employees against another, or by another Indian against an Indian employee, as well as disorderly conduct or other status-type offenses committed by Indians on petitioner's land. In addition, the Navajo Nation necessarily acts as first responder for a host of offenses over which it may share jurisdiction with the United States, including crimes by Indians against non-Indians and serious crimes by Indians. Cf. *Strate*, 520 U.S. at 456 n.11 (noting authority of tribal police to patrol roads built on rights-of-way through a reservation).

See, *e.g.*, *Manygoats*, *supra* (resolving claim brought against petitioner under tribal labor law); cf. J.A. 48, 53-54.

Of course, all businesses, and all tourists, impose some local costs, as well as bringing many local benefits. The Navajo Nation, like all governments, seeks both to maximize the benefits and to manage the costs of local businesses, including tourism. The necessity for the Navajo Nation to exercise its "legislative jurisdiction," *Strate*, 520 U.S. at 453, over nonmember transactions on petitioner's land would, perhaps, be more obvious if petitioner were operating a garbage dump or a polluting factory. Cf. *Arizona* v. *California*, 373 U.S. 546, 598-601 (1963) (holding that creation of reservation included water rights necessary to make land livable) (cited in *Montana*, 450 U.S. at 566 n.15). The Tribe's power to exercise that jurisdiction should, however, be equally clear in the less dramatic context of this case.[11]

Petitioner operates a successful business on the Navajo Reservation. Petitioner's Trading Post, and the guests who come to and stay at it, make demands on, and present opportunities for, the local government. All governments need to fund their activities, including those directly affected by visiting tourists; and the imposition of a modest occupancy tax on hotel guests is one wholly conventional way of seeking the necessary revenue. Cf. *Merrion*, 455 U.S. at 137-138 (where petitioners engaged in business on reservation and benefitted from government services, there was "nothing exceptional in requiring [them] to contribute through taxes to the general cost of tribal government"). *Montana* and *Strate*, of course, underscore that the sover-

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[11] The imposition such a tax places on such a business or its patrons is, moreover, considerably less onerous than many other forms of civil regulation, such as the prohibition or restraint on land development that was at issue in *Brendale*, or the requirement at issue in *Strate* that a nonmember defend litigation brought against it in an unfamiliar forum.

eign powers of Tribes are circumscribed when it comes to regulating nonmember activities on fee land. In this case, however, as we have discussed, federal regulations specifically contemplate a role for the Tribe in regulating petitioner's business; the tribal government has civil jurisdiction over the other lands and businesses in the relevant area of its Reservation; and the commercial transactions that the Tribe seeks to tax are ones that have foreseeable direct effects—both positive and negative—on the economic security, health, and welfare of the local Navajo. Under these circumstances, the Tribe's occupancy tax does not represent an extension of jurisdiction "beyond what is necessary to protect tribal self-government." *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564). The Tribe's right to collect the tax should accordingly be sustained.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, Members of the Navajo Tax Commission; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF ROBERTA BUGENIG, JAMES D. THOMPSON, JULIA R. THOMPSON, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. May an Indian tribe tax activity on land which is held in fee simple by nonIndians and which was entirely outside of the reservation until the reservation's boundaries were extended so that they now surround it?

2. May Congress delegate to a tribe regulatory authority over property that is held in fee simple and was clearly subject to state jurisdiction at the time the property was enveloped by an expansion of the reservation's boundaries?

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IDENTITY AND INTEREST OF AMICI[1]

Pursuant to Supreme Court Rule 37.3, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

For more than two decades, Pacific Legal Foundation has litigated in support of property rights and individuals adversely affected by government tax and regulatory actions.

The Foundation's focus has come to include the tax and regulatory authority asserted by Indian tribes over nonIndian-owned fee property located within the exterior boundaries of Indian reservations.

Foundation attorneys, for instance, are representing Amici James D. and Julia R. Thompson and the Custer Battlefield Trading Company in *Thompson v. Adams*, Montana District Court No. 98-110. This litigation challenges a 4% "resort tax" that the Crow Indian Tribe imposed on gross receipts of a nonIndian business located on nonIndian fee land within the tribal reservation's exterior boundaries. The district court ruled in favor of the Thompsons, and the case is pending before the Ninth Circuit Court of Appeals.

In the case of *Bugenig v. Hoopa Valley Tribe*, 2000 U.S. App. LEXIS 24746 (9th Cir. 2000), Foundation attorneys represent Amicus Mrs. Roberta Bugenig in challenging the Hoopa Valley Indian Tribe's claim of regulatory jurisdiction over timber harvesting activity on Mrs. Bugenig's fee property.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation, Roberta Bugenig, James D. and Julia R. Thompson, and the Custer Battlefield Trading Company affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

The case under review implicates issues central to both the *Bugenig* and *Thompson* litigation.

SUMMARY OF ARGUMENT

Reversal of the ruling below is called for because that ruling wrongly disregards the special status, within Indian reservations, of property held in fee simple. Such property cannot be willy-nilly subjected to a tribe's regulatory and taxing authority without subverting the authority of the state and, indeed, without doing violence to traditional understandings of what fee simple ownership entails.

The very concept of fee ownership of property creates a strong presumption that nonIndian-owned property that is held in fee is not subject to tribal taxation, even when it lies within the outer boundaries of an Indian reservation. Thus, this Court has recognized that state jurisdiction supplants tribal jurisdiction on formerly tribal properties that were privatized through the allotment process. How much stronger is the presumption of state jurisdiction where the property that is held in fee was never tribal property to begin with?

When considering whether a tribe has acquired regulatory authority over fee simple property within its exterior boundaries, it is important to recognize the limits on congressional power to declare such a thing so, especially where the United States did not originally hold jurisdiction over the property or activity that is now claimed to be under tribal sway. An act of Congress cannot transfer jurisdiction over fee property to an Indian tribe, where Congress did not itself have jurisdiction over that property. To say the same thing, Congress may not make such a transfer where it was a state that held jurisdiction. Indeed, in the instances discussed by this Court where Indian tribes have received express congressional

delegation of authority over property, states were not divested of jurisdiction because the tribe's authority had already been recognized by a treaty that preceded the admission of the state to the Union.

A too-casual acceptance of claims of congressional delegation not only undermines state sovereignty; it also potentially conflicts with recent court rulings that have stressed the constitutional guardrails to congressional transfers of various aspects of governmental authority.

For these reasons, Amici respectfully submit that this Court should deny Respondents' claim of regulatory authority over Petitioner's nonIndian guests.

ARGUMENT

I

THE COURT BELOW GAVE INSUFFICIENT WEIGHT TO THE FACT THAT PETITIONER'S LAND IS FEE SIMPLE PROPERTY

There is no question that the fee land owned by the Atkinson Trading Company is fee simple property. *See* Petitioner's Appendix at 2a. Indeed, its status as fee property antedates its inclusion within the exterior boundaries of the Navajo Reservation. It was made an inholding in the reservation as a result of a congressional expansion of the reservation boundaries. *Atkinson Trading Company, Inc. v. Shirley*, 210 F.3d 1247, 1265 (10th Cir. 2000) (Briscoe, J., dissenting). *See* Act of Congress of June 14, 1934, ch. 521, 48 Stat. 960, 961.

The significance of this fact is discounted by the court below. *See Atkinson*, 210 F.3d at 1261: "Our reading of Supreme Court precedent rejects the arbitrary factual basis of fee status as the determinative factor" as to whether the tribe has jurisdiction to impose a tax on an enterprise or activities within its exterior boundaries. The Court proceeds to posit an

alternative analytical framework which applies, apparently, irrespective of the fee status in question–namely a "balancing test" in which "the impact of the [nonmembers'] activity on the tribe [is balanced] with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction." *Id.* at 1267-68.

In fact, however, fee status is a crucial determinant under this Court's precedents. In *Montana v. United States*, 450 U.S. 544, 557 (1981), the Court was considering the "power of the [Crow Tribe of Montana] to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." In *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997), the issue was claims against "nonmembers arising out of accidents on state highways" running through Indian reservations. In both *Montana*, 450 U.S. at 557, and *Strate*, 520 U.S. at 454, this Court indicated it would have analyzed these tribal jurisdiction questions differently if they had involved conduct by nonmembers on tribal land and not merely within tribal boundaries.

In *Strate*, 520 U.S. at 446, this Court affirmed its rule that where no treaty or statute indicates otherwise, the tribe is *presumed to lack civil authority* over nonIndian lands within its reservation boundaries—absent the narrow exceptions laid down in *Montana*. Thus, it is the status of the land—not any "balancing test"—that is the crucial determinant as to who has authority, and where the land is held in fee—as in the case at bar—the presumption is against tribal authority.

A. The Strong Presumption That NonIndian-Owned Fee Simple Property Is Not Subject to Tribal Taxation or Regulation Can Be Traced to the History, Nature, and Status of Fee Simple Property

The primacy of state authority—as opposed to tribal authority—when it comes to property owned in fee within the boundaries of Indian reservations is exemplified in the

properties that become private as a result of the General Allotment Act of 1887, 24 Stat. 390 (1887), 25 U.S.C. § 331, *et seq.* Indeed, assimilation into general society–and the dissolving of tribal society and authority–were the precise aims of allotment policy.

> A period of twenty-five years was established during which the Indian owner was expected to learn proper business methods; at the end of this time the land, free of restrictions against sale, was to be delivered to the allottee. With a free and clear title the Indian became a citizen and came under the jurisdiction of the state in which he or she resided . . . . Private property, [federal officials] believed, [would lead] people directly to a "civilized" state.

Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice*, at 9 (University of Texas Press, Austin 1983).

Because the aim and result of the Allotment Act was to diminish tribal jurisdiction over fee lands, this Court has recognized that it is logically consistent, under the Allotment scheme, for state jurisdiction to supplant tribal authority on those properties:

> It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 559 n.9; *quoted in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 423 (1989) (plurality opinion).

To be sure, Congress ultimately repealed the Allotment Act, but the jurisdictional changes that the act had effected were not reversed.

While this Court has recognized limits on state jurisdiction over Indians residing on fee lands within reservations–*see, e.g.*, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), disallowing certain direct state taxes on Indian residents of a reservation–state regulatory jurisdiction over fee lands themselves has been upheld. For instance, this Court has approved real estate taxes on fee lands within reservations as consistent with the Allotment Act, whether the owners of the property are Indians or nonIndians, because the jurisdiction is in rem rather than in personam. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian*, 502 U.S. 251, 264-65 (1992).

If the presumption of state jurisdiction over property that was privatized through allotment is so strong, how much more powerful is the presumption as it attaches to property that was never tribal property to begin with? Such is the Atkinson property, which is fee property that was brought within the reservation boundaries only when those boundaries were expanded by Congress in 1934. *Atkinson*, 210 F.3d at 1265 (Brisco, J., dissenting).

Indeed, the very language of the Act expanding the tribe's boundaries gives rise to a presumption that Congress was not assuming, curtailing, or delegating existing jurisdictions over any fee property: "All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the [areas added to the Navajo Reservation under the act], shall not be affected by this Act." 48 Stat. 961 (1934). If Congress intended to be in any way altering jurisdiction over "valid rights" on property that would henceforth lie within the reservation's boundaries, Congress could hardly have stated in such a categorical way that those rights would remain "unaltered." Indeed, at the very essence of this case is the acknowledgment that the extent and shape of rights on terrain within Indian reservations depends on who holds jurisdiction over that terrain.

B. An Act of Congress, Such as That Which Expanded the Navajo Reservation's Boundaries, Cannot Extinquish the Presumption of State Jurisdiction over Fee Simple Property

In 1934, the year the Atkinson property was brought within the boundaries of the Navajo Reservation by a congressional act expanding those boundaries, 210 F.3d at 1265, Arizona was already a state. Therefore, the Atkinson property was already under state jurisdiction at the point it became an inholding within the Navajo Reservation.

This fact defeats an argument that the Atkinson land might have been transferred to tribal jurisdiction through the act of Congress that brought it within the tribe's borders.

Indeed, the very act by which Congress expanded tribal boundaries creates a presumption that existing jurisdiction over fee property was not being disrupted. *Id.*

Indeed, a congressional transfer of jurisdiction of the Atkinson property could not have taken place because jurisdiction over the Atkinson land was not Congress' to delegate. The property came under the state's jurisdiction. The jurisdiction of a state, after all, "is co-extensive with its territory; co-extensive with its legislative power." *United States v. Bevans*, 16 U.S. 336, 387 (1818).

The primacy of the state–and the fact, consequently, that jurisdiction was not transferred to the reservation–is underscored by reviewing cases where Congress has been found to have invested a tribe with jurisdiction over a particular activity on fee property. In such cases, states have not been divested of jurisdiction because the states in these cases did not have jurisdiction to begin with.

In *Montana*, for instance, this Court noted that Indian tribal sovereignty over nonmembers "cannot survive without express congressional delegation." 450 U.S. at 564. But the

instances that this Court discussed where express congressional delegation had taken place involved circumstances where a tribe's jurisdiction was recognized before the particular state became a state. *Id.* at 552-53. The Court referred, for instance, to the Chippewa Treaty of 1854 (adopted before Minnesota became a state), and the Crow Treaty of 1851 (adopted before Montana's statehood). *Id.* In neither case was there an attempt to divest a state of existing regulatory jurisdiction over fee property.

Nor does the case under review involve activity over which the federal government had jurisdiction that it could delegate. While Congress does have power under Article I, section 8, to "regulate Commerce . . . with the Indian Tribes," the commerce on the Atkinson property to which the challenged taxation applies is commerce between a nonIndian property owner (*Atkinson*, 210 F.3d at 1249) and, to a great extent if not exclusively, the owner's nonIndian guests. *Id.* at 1270 (Briscoe, J., dissenting).

Do the transactions of nonIndian guests, on nonIndian-owned land, at the nonIndian-owned Atkinson hotel, restaurant, and other enterprises, still have a ripple effect that transforms them into commerce with "Indian Tribes" as understood by the Indian Commerce Clause? Perhaps under an "aggregation" analysis such a tenuous connection might be plausible, but this Court's precedents do not favor such extrapolation as a means of justifying claims of jurisdiction over activity on fee land in reservations. Specifically, under the second "exception" in the *Montana* analysis, 450 U.S. at 566, this Court requires that nonmembers' activity on alienated land have "direct effect" on a tribe's economic security, health, or welfare in order to justify tribal jurisdiction. "We do not doubt the truth of John Donne's observation that 'no man is an island.' . . . However, the Supreme Court has declined to employ this logic in conjunction with the second Montana exception." *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999)

(citing *Strate v. A-1 Contractors*, 520 U.S. 438, 458-59 (1997)). The aggregation approach is no more justified as a means of discovering "commerce . . . with" an Indian tribe based on transactions between a nonIndian enterprise on nonIndian-owned land and nonIndian customers.

Moreover, Congress has made no assertion of authority over the commerce on Atkinson's property. Quite the opposite:

> The statute expanding the reservation's boundaries explicitly disclaimed any disruption of pre-existing "rights and claims" on lands thus brought within the reservation borders.

48 Stat. 960, 961 (1936).

While Congress could transfer to a tribe, say, the regulation of liquor sales in Indian Country (*United States v. Mazurie*, 419 U.S. 544, 547 (1983)), such sales, unlike the activity on the Atkinson property, have always been squarely within the ambit of the Indian Commerce Clause and subject to congressional bans since at least 1832. *Rice v. Rehner*, 463 U.S. 713, 722 (1983).

Congress cannot take regulatory jurisdiction that it never had and then delegate that authority to a tribe.

C. Recognizing a Congressional Delegation of Regulatory Authority in this Case Would Conflict with Clear Constitutional Precepts

The Tenth Amendment to the United States Constitution states that "[t]he powers not delegated to the United States . . . are reserved to the States." A healthy respect for state prerogatives mandates caution when considering whether the United States Constitution countenances the federal government transferring to a tribe state regulatory jurisdiction over nonIndian land.

Likewise, federal delegation of regulatory power over nonIndians' *activity* on nonIndian-owned fee property is also constitutionally problematic, to say the least, where, as in this case, it was the state, not the federal government, that had jurisdiction over that property even before it was brought within the borders of the reservation. It should be noted that in recent years courts have applied increasing scrutiny to purported delegations of congressional authority. In *Printz v. United States*, 521 U.S. 898, 923-24 (1997), for instance, this Court struck down a federal administrative mandate on state officials not only because it subverted state autonomy but also because it impermissibly transferred federal executive branch authority to "thousands of [local law-enforcement officials] without meaningful Presidential control." *Id.* This Court, recognized that "the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."

Clearly, this Court has recognized clear constitutional guardrails to congressional transfers of authority. In the case at bar, it would be the State of Arizona's prerogatives that would be usurped by any assertion that Congress could delegate regulatory authority over the Atkinson property, because that property is and always has been subject to state jurisdiction.

Even where the federal government does have an original jurisdiction, this Court has found that, for a delegation of such authority to an Indian tribe to be lawful, the receiving entity must have independent sovereign authority to administer the delegated power. Thus, the Court noted in *Mazurie*, 419 U.S. at 556-67, that there are "limits on the authority of Congress to delegate its legislative power," but that those limits are "less stringent in cases where the entity exercising the delegated authority itself possess independent authority over the subject matter."

The Indian tribe in *Mazurie* possessed the requisite "attributes of sovereignty over both their members and their territory" that justified its receiving delegated authority over liquor sales by a bar within the reservation's boundaries. *Id.* at 557. But the transactions subject to tax challenged in the case at Bar are distinguishable. They are between a nonIndian property owner (*Atkinson*, 210 F.3d at 1249) and, to a great extent if not exclusively, the owner's nonIndian guests. *Id.* at 1270 (Briscoe, J., dissenting).

Petitioners in *Mazurie* had urged that because the party subject to regulation was not a member of the tribe and could not become a member of the tribe, the tribe could not be delegated regulatory power over the party's liquor sales. 419 U.S. at 557. This Court, *id.*, responded by citing precedent recognizing that tribal authority "could extend over nonIndians, insofar as concerned their transactions on a reservation with Indians." "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 558 (quoting *Williams v. Lee*, 358 U.S. 217 (1959)).

At least to the degree the transactions in the case on review are between nonIndians and other nonIndians–which may, indeed, be all or nearly all of the Atkinson transactions–they do not fall within precedent cited in *Mazurie* to recognize a tribal sovereignty over subject matter involving nonIndians.

Hence, not only does Congress lack power to delegate, whether the tribe has the clear independent sovereignty necessary to receive regulatory power in this context is in question.

CONCLUSION

For the above reasons, this Court should recognize that the Tribe does not have regulatory authority over Petitioner's nonIndian guests, and the ruling below should be reversed.

DATED: January, 2001.

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JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus Curiae, Association of American Railroads, addresses the following question:

> Whether an Indian tribe lacks jurisdiction to impose a tax on nonmember activities and transactions on nonmember fee lands (or their equivalent) within an Indian reservation?

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INTEREST OF AMICUS CURIAE[1]

The Association of American Railroads ("AAR"), a non-profit national trade association representing the Nation's major railroads, appears in this case as an *amicus curiae* because its members have a vital interest in ensuring that their property interests and activities within Indian reservations and across Indian lands are subject to clear jurisdictional rules that will not hinder the railroads' ability to provide interstate rail service. All parties have consented to AAR's *amicus* participation. AAR's members include intercity passenger, commuter and freight railroads. The freight railroad members operate 76 percent of the line-haul mileage, employ approximately 90 percent of the workers, and account for approximately 93 percent of the freight revenues of all railroads in the United States. In addition, AAR member railroads operate on longstanding rights-of-way granted by the federal government that cross dozens of different Indian reservations in the United States, and some of their railroads also run through areas located adjacent to Indian reservations, but within areas over which Indian tribes or groups assert civil jurisdiction.

AAR represents its member railroads before courts, agencies, and the United States Congress on matters of common concern to its members. It has filed briefs *amicus curiae* before this Court.[2] The decision below may have a

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[1] This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amicus curiae* or its members, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, U.S. Supreme Court Cause No. 99-2035 (filed December 4, 2000); *Burlington Northern R.R. v. Blackfeet Tribe*, U.S. Supreme Court Cause No. 91-545 (filed November 1, 1991); *Southern Pacific Transportation Co. v. Hernandez*, U.S. Supreme Court Cause No. 91-293 (filed

serious adverse effect on the railroad industry, since it exposes the industry to extensive and potentially burdensome tribal taxation and regulation of railroad properties and activities. Railroads have little or no voice in tribal governments and, like other nonmember businesses, are targets for taxing and other revenue raising efforts tribes may seek to impose without adversely affecting their own members. Tribal taxation of railroad properties and associated rail transportation activities could have dramatic and negative impacts on the railroad industry and the free flow of interstate commerce.

America's railroads cross the lands or reservations of a large number of tribes that may seek to impose a variety of taxes and regulatory schemes on railroad property or activities. It is critical to railroads and others doing business on Indian reservations for there to be reliable and objectively discernable guideposts for determining whether a particular tribe has jurisdiction—including the power to tax—over railroads and other businesses. The decision below significantly blurs the applicable standards and impairs the railroads' abilities to reliably predict tribal taxing powers.

SUMMARY OF ARGUMENT

As governments whose sovereignty is narrowly confined, *see generally United States v. Wheeler*, 435 U.S. 313, 326 (1978), Indian tribes generally lack civil jurisdictional authority over the property and activities of nonmembers on nonmember fee lands. As to nonmember fee lands, this rule derives from *Bates v. Clark*, 95 U.S. 204 (1877). In the last 20 years, this Court has reaffirmed and clarified the general rule that tribes lack jurisdiction over nonmember lands and associated activities except in very specific and narrow

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September 18, 1991); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

circumstances. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The court below misconstrued this Court's recent pronouncements and has misunderstood the historical underpinnings of those decisions.

The historical record of judicial decisions, administrative interpretations, and learned commentators demonstrates that Indian tribes were understood to lack jurisdictional authority over nonmember activities on nonmember lands, unless a treaty or federal statute conferred such power on the specific tribe involved. *See Bates v. Clark*, 95 U.S. 204 (1877). The modern application of this rule is reflected, as to fee lands, in *Montana*, and as to rights-of-way, in *Strate*. This Court's decisions establish that land status is a critical determinant of the scope of tribal powers.

Recent Congressional action defining "Indian country" for purposes of state or federal criminal jurisdiction and authorizing specific delegations of power through statutes like the Clean Water Act do not qualify as federal statutes that authorize the exercise by Indian tribes of general civil jurisdiction over nonmembers. Here, unlike the situation in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), no treaty or federal statute confers any civil jurisdiction upon the Navajo Nation that would support the asserted tribal tax.

The Court of Appeals for the Tenth Circuit has devised an interpretation of *Montana*'s "consensual relationship" exception that would enable tribes to exercise civil jurisdiction over even the most casual visitor who traverses a reservation. To reach that result, the court below misinterprets this Court's clear and unequivocal decisions. *Amicus* submits that this Court's decisions require that for a "consensual relationship" to support the exercise of tribal jurisdiction, the relationship must be between the tribe and the entity or person to be regulated, must be clear and contractual, reflecting consent to jurisdiction, and must

directly concern the subject matter of the asserted tribal jurisdiction. That definition will provide predictability to those doing business on Indian reservations. The Court should reverse the decision below and clarify standards defining a consensual relationship "of the qualifying kind." *Strate*, 520 U.S. at 457.

ARGUMENT

I. TO AFFORD PREDICTABILITY, LAND STATUS SHOULD REMAIN A CRITICAL FACTOR IN DEFINING TRIBAL JURISDICTION OVER NONMEMBER PROPERTY AND ACTIVITIES.

A. This Court's Decisions Make Plain that Land Status is the Predominant Factor in Evaluating Tribal Jurisdiction over Nonmembers.

This Court's decisions concerning the scope of tribal civil jurisdiction have consistently focused on land status as a central factor in concluding that Indian tribes generally lack the power to tax and regulate nonmember activities and property on nonmember lands located within reservation boundaries. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981). These cases reflect that land status is a critical, if not determinative, factor in defining the geographic scope of tribal jurisdiction. *See also Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). The conclusion of the court below that "fee status is simply *one* factor a court should consider in applying the *Montana* framework and weighing the interests of the nonmembers against those of the tribe but not *the* determining factor," cannot be reconciled with this Court's opinions. *Atkinson*

Trading Co. v. Shirley, 210 F.3d 1247, 1256 (10th Cir. 2000) (emphasis in original).

The "path-marking case concerning tribal civil jurisdiction over nonmembers" is *Montana v. United States*, 450 U.S. 544 (1981). *Strate*, 520 U.S. at 445.

> *Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: [3] The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Id. at 446.[4] In *Montana*, the Court's discussion of the scope of tribal sovereignty referred repeatedly to the concept that

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[3] In *Montana*, the Court confirmed that, if an exception applies, the tribe *may* have the authority to "regulate, through *taxation*, licensing, or other means the activities of nonmembers...." 450 U.S. at 565 (emphasis added). This statement draws a clear parallel between the scope of a tribe's regulatory and taxing jurisdiction. As discussed below, in *Strate*, the Court confirmed that the scope of regulatory authority equates to a tribe's adjudicatory authority. This straightforward parallelism hews to historical precedent.

[4] In *Strate*, the Court compared a tribe's limited civil authority over nonmembers with the absence of any tribal criminal jurisdictional authority over nonmembers. *Id.* at 445, *citing Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Justice Ginsberg in *Strate*, and the Court in *Montana*, noted that "*Oliphant* rested on principles that support a more 'general proposition'." *Strate*, 520 U.S. at 445, *quoting Montana*, 450 U.S. at 565. That "general proposition" in essence is that Indian tribes, as limited sovereigns, historically lacked jurisdiction over nonmembers and their lands and activities. Historical understandings would support a simple rule that Indian tribes lack civil jurisdiction over nonmembers' fee lands (and their equivalent, including federally-granted rights-of-way) and activities on those lands. *See* Point I.B, *infra*.

general principles of tribal sovereignty do not support the exercise of tribal jurisdiction over nonmember property and activity on nonmember fee lands. *See* 450 U.S. at 564-65 ("hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations"). Then, after describing the two limited exceptions that "may" support tribal jurisdiction over activities on nonmember fee lands, the Court concluded that neither exception applied to "[n]on-Indian hunters and fishermen on nonmember fee land," and distinguished these lands from "lands still owned by or held in trust for the Tribe or its members." 450 U.S. at 566-67. The Court's analysis and result in *Montana*, particularly when contrasted with the decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), a case arising on tribal trust lands, demonstrate the critical impact of land status and of a tribe's loss of the power to exclude.

The Court's decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), is consistent with *Montana*. There, while upholding the Tribe's authority to tax oil and gas lessees' activities on tribal trust lands on the reservation, the Court stated: "[A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. . . . A tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the Tribe." 455 U.S. at 141-42. There, the nonmembers were operating pursuant to a contract with the Tribe on on-reservation tribal trust lands.[5]

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[5] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), fundamentally a state tax case, is also consistent with *Montana*. There, the Court rejected the state's argument that the Tribes lacked the power to tax transactions on trust lands, stating: "Executive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-

In *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Court considered once again the scope of a tribe's power to regulate nonmember lands and activities. There, Justice White stated that, as to all nonmember lands, "the Yakima Nation no longer has the power to exclude fee owners from its land within the boundaries of the reservation." *Id.* at 424. "Therefore, that power can no longer serve as the basis for tribal exercise of the lesser included power [to regulate]." *Id.* Inasmuch as there is no evidence in the record that the Navajo Nation has engaged in any "historic and consistent" effort to limit access, maintain control over, or preserve the character of the area in which the Cameron Trading Post and related facilities are located, the Court's analysis applicable to the "closed" portion of the Yakima Reservation is inapposite because there is no evidence the Navajo Nation ever sought to exercise a power to exclude with respect to the Atkinson lands. *See* 492 U.S. at 438-40 (Stevens, J.).

The Court next emphasized the critical significance of the loss of power to exclude in *South Dakota v. Bourland*, 508 U.S. 679 (1993). There, the Court stated:

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case [broadly opened to the public], implies the loss of regulatory jurisdiction over the use of the land by others.

Id. at 689. The *Bourland* Court observed: "regulatory authority goes hand in hand with the power to exclude." *Id.* at 691 n.11, *citing Brendale*, 492 U.S. at 423-24 (White, J.).

Indians *on Indian reservation lands in which the tribes have a significant interest.*" 447 U.S. at 152 (emphasis added).

Consequently, where a tribe has no right to exclude nonmembers from particular lands within a reservation, the tribe will ordinarily lack the power to regulate or tax those lands or their use.

The unanimous Court in *Strate* laid to rest any doubt regarding the significance of land status and the power to exclude. There, the Court determined that federally-granted rights-of-way crossing Indian reservations were the equivalent of fee lands, and thus were governed by the jurisdictional analysis prescribed in *Montana*. 520 U.S. at 456. In reaching this conclusion, the Court rejected the tribal court plaintiffs' contention that tribal courts possess general jurisdiction within reservation boundaries without regard to land status. Having concluded that the highway right-of-way was the equivalent of fee land,[6] the Court held that tribal court jurisdiction could not be sustained unless the tribal court plaintiffs could establish that either of *Montana*'s exceptions applied. If not, the main rule—driven by land status and the concomitant loss of the power to exclude—controlled. *Id.* at 456.

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[6] In *Burlington Northern R.R. Co. v. Red Wolf*, 522 U.S. 801 (1997), where the Court issued a writ of *certiorari*, vacated a decision of the Ninth Circuit, and remanded for further consideration in light of *Strate*, the Court signaled that other federally-granted rights-of-way also are subject to the analysis in *Strate*. The Ninth Circuit then properly applied *Strate* to federally-granted railroad rights-of-way. See *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000). More recently, the Ninth Circuit recognized that *Strate* required the overruling of its earlier decision in *Burlington Northern R. R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), because *Blackfeet Tribe* failed to recognize that the railroad right-of-way at issue there was the equivalent of fee lands. Hence, the court held that the tribal taxes levied on utility properties could not stand in light of *Strate*. *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000).

Finally, in *Venetie*, this Court unanimously rejected the Ninth Circuit's multi-factor test, similar in the unpredictability of its application to the sliding scale proposed by the Court below. *See Atkinson*, 210 F.3d at 1255. Instead, this Court's decision in *Venetie* focused on the land status and federal superintendence of specific lands in reaching its conclusion that the Native Village lacked the power to tax. *See* 522 U.S. at 525-27. Even though the business activities subject to the asserted tribal tax occurred on lands owned in fee by the Native Village, the Court stated that the Village could not tax the activities since the lands were not reservation lands, were not trust allotments, were not lands set aside by the federal government for the use of the Indians, and were not subject to the superintendence of the federal government. *Id.* at 526-32. *Venetie* and this Court's other decisions lead to the conclusion that the court below erred when it stated that "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." *See* 210 F.3d at 1254. *Montana*'s "main rule" is that tribes generally lack civil jurisdiction over nonmembers on nonmember fee lands and on federally-granted rights-of-way.

The Court has worked hard to clarify and define the powers of Indian tribes over nonmembers on nonmember fee lands or their equivalent. However, the decision below ignores this Court's writings, expands beyond recognition the narrow exceptions potentially available that might support assertions of tribal jurisdiction, and cannot be harmonized with this Court's decisions in *Montana*, *Brendale*, and *Strate*. This case presents the Court with an important opportunity to clarify its jurisprudence concerning the scope of tribal jurisdiction over nonmember property and activities on nonmember-owned fee lands.

B. Historical Understandings and Contemporaneous Interpretations Demonstrate that Tribal Jurisdiction is Significantly Reduced on Nonmember Fee Lands or Their Equivalent.

1. Absent powers conferred by treaty or Congress, historically, Indian tribes lacked jurisdiction over nonmembers on fee lands.

The decision below runs counter to pertinent historical federal decisions and policies and contemporaneous understandings concerning tribal jurisdiction. The "common notions" held by all branches of the federal government during the nineteenth and early twentieth centuries, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), reflect clearly that Indian tribes generally lacked civil jurisdiction over nonmembers. As this Court stated in *Solem v. Bartlett*, 465 U.S. 463, 468 (1984), a reservation disestablishment case:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.

Citing Bates v. Clark, 95 U.S. 204 (1877) and *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). Land title and whether real property retained any trust or restricted status, and not reservation boundaries, were then considered determinative of jurisdictional issues.[7]

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[7] The absence of any remaining tribal or Indian interests is particularly significant where, as here, tribal *civil* jurisdiction over nonmembers is asserted, and questions of state or federal *criminal* jurisdiction (following

Bates v. Clark, 95 U.S. 204 (1877), provides historical standards this Court has used repeatedly to determine jurisdiction over nonmember lands. In that case, involving a civil claim that military officials trespassed and improperly seized a quantity of whiskey, the Court stated:

> The simple criterion is, that, as to all lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

95 U.S. at 208 (emphasis added).[8] As this Court noted in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 613 n. 47 (1977),[9] when "Indian title had been extinguished, . . . the

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the "uncoupling of reservation status from Indian ownership" in the 1948 Major Crimes Act, *see Solem*, 465 U.S. at 468) are not. *See* Point I.B.3, *infra*.

[8] The Court's ruling in *Montana* reaffirmed that congressional action may confer tribal jurisdiction. *See Montana*, 450 U.S. at 564. However, short of a treaty provision or act of Congress, when a tribe cedes the power to exclude, tribal jurisdiction over nonmembers activities ceases (absent the exceptions the Court described in *Montana*.).

[9] In *Rosebud*, tribal *amici curiae* advised this Court:

> [A]t the time the *Rosebud* statutes were enacted [in 1904, 1907, and 1910], the 'title theory' was dominant. A Congressman then would have assumed. . . that each parcel ceased to be Indian country upon the extinguishment of Indian ownership. The term "diminished" would mean diminished in ownership, not boundaries, since ownership was then thought to be the significant jurisdictional factor.

Brief of *Amici Curiae* National Congress of American Indians, *et al.*, 28, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

jurisdiction of the State . . . was full and complete." *Citing Dick v. United States*, 208 U.S. 340, 352 (1908). Thus, resolution of questions of title also was understood to resolve questions of federal, tribal, or state jurisdiction, absent an express congressional statement that federal or tribal jurisdiction should be preserved.[10] This understanding persuasively supports *Montana*, *Strate* and the Court's other recent cases which equate the loss of tribal power to the loss of the power to exclude.

Prior to and contemporaneous with 1934, Indian tribes were not recognized as having the power to tax nonmembers on nonmember lands absent a Congressional expression of intent to that effect. In 1942, just after the 1934 Arizona Boundary Act, 48 Stat. 960, that extended the Navajo Reservation into the vicinity of the Atkinson Trading Company lands, Felix S. Cohen, stated:

> The power to tax nonmembers is derived in the cases from the authority, founded on original sovereignty and guaranteed in some instances by treaties, to remove property of nonmembers from the territorial limits of the tribe. Since the tribal government has the power to exclude, it can extract a fee from nonmembers as a condition precedent to granting permission to remain or to operate within the tribal domain.

Felix S. Cohen, *Handbook of Federal Indian Law*, 266-67 (1942 Ed.) Of course, where a tribe has lost the power to exclude, that limited power "to extract a fee" also is lost. The historical authority relating to the taxing power of tribes confirms that Indian tribes lacked the inherent power to tax

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[10] In *Dick v. United States*, 208 U.S. 340 (1908), the Court emphasized that in *Bates* the Court "took care" to note that an exception to the general rule would apply where Congress or a treaty provision preserved tribal jurisdiction.

nonmember activities on nonmember fee lands within a reservation.

Indian tribes were understood historically to lack jurisdiction over nonmember activities on nonmember lands absent an expression from Congress to the contrary. Because jurisdiction was understood contemporaneously to follow title, when the Navajo Reservation was extended in 1934 to include lands in the vicinity of the Cameron Trading Post, the contemporaneous understanding would have been that the Navajo Nation lacked jurisdiction over Atkinson Trading Company's fee lands. That the Navajo Nation lacked any interest in those lands would have been considered determinative historically, and at least should be held to have significantly reduced the power of the Navajo Nation over the lands and activities. A tribe can exercise no civil jurisdiction over nonmember activities on fee lands or rights-of-way, unless the tribe can demonstrate that one of the two *Montana* exceptions applies.

2. *Buster v. Wright* and other historical tribal tax precedent do not support the exercise of tribal taxation here.

Tribal tax cases decided around the turn of the century support the absence of tribal jurisdiction over nonmember fee lands and associated activities.

The Tenth Circuit's extensive reliance on *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), to support the notion that the Navajo Nation has the power to tax activities on Atkinson Trading Company's fee lands, is misplaced. *See* 210 F.3d at 1255-56, 1258-63.[11] After discussing the scope of the powers

[11] That "*Buster* and *Merrion* use similar language and similar analysis in their consideration of tribal taxing powers on activities taking place on fee lands and tribal lands" 210 F.3d at 1258, relates to the fact that *Merrion* arose on tribal trust lands, and *Buster* involved a circumstance

of Indian tribes and the Creek Nation, the Eighth Circuit in *Buster* specifically considered this Court's decision in *Bates v. Clark*, 135 F. at 952, and the "rule" that when Indian title is extinguished, so too is tribal jurisdiction. In clear language, the court noted that:

> the case before us falls not under the rule [in *Bates*], but under the exception to the rule [i.e., where Congress or a treaty provides otherwise], set forth in the opinion cited. The rule applies to the extinguishment of the original Indian title by occupancy. The case under consideration involves the extinguishment of no such title. The rule governs cases in which a different rule is not made applicable by treaty or by act of Congress. . . . The Creek Nation...held its territory under a patent from the United States and under an act of Congress which expressly provided that it should be the country of the Creeks "so long as they shall exist as a nation and continue to occupy" it. They still exist as a nation, and they still continue to occupy that country, notwithstanding the fact that those who are noncitizens of their tribe hold the title to and occupy isolated lots and tracts of land therein.

Id. Thereafter, the Eighth Circuit noted that a 1901 agreement with the Creek Nation guaranteed the continued jurisdiction of the Creek Nation until 1906, when that jurisdictional authority was to be extinguished absent some further act of Congress. *Id.* at 953. Finally, the court stated:

> The treaties and agreements between the United States and the Creek Nation under which title from the United States and jurisdiction to govern its country within the limits of its patent were guarantied to it, the acts of Congress, and the decisions of the courts which have

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where the treaty and federal statutes involved preserved the tribal power to tax. *Montana* 's essential distinction was not presented in either case.

> respected and sustained that jurisdiction, clearly take this case out from under the general [Bates] rule that the extinguishment of original Indian title by occupancy removes land from the Indian country . . . .

Id. These determinations were made against a historical backdrop that clearly and unequivocally confirmed that, as of 1901, under prior treaties and federal statutes, the Creek Nation had taxing power over the nonmember purchasers. *Id.* at 953-54, *citing* Act of June 28, 1898, 30 Stat. 495; 23 Op. Atty. Gen. 214, 217-220 (1900).[12] Therefore, as was the case with the Cheyenne River Sioux Reservation in *Solem*, the Creek Nation retained an "interest" in the lands at issue pursuant to congressional authority so as to preserve limited tribal powers.

This Court's decision in *Morris v. Hitchcock*, 194 U.S. 384 (1904), upholding the Chickasaw Nation's power to tax, also was premised on the same foundation: specific treaties and federal statutes authorized the Chickasaw Nation's power to tax. *See also Maxey v. Wright*, 3 Ind. T. 243, 54 S.W. 807, *aff'd*, 105 F. 1003 (8th Cir. 1900), where the court upheld the Creek Nation's power to impose a tax on attorneys, premised specifically on a treaty provision preserving the power. 54 S.W. at 808-10. However, the Creek Nation itself was not empowered under the applicable treaty to collect the tax itself, and would only have had the power to request removal of attorneys who failed to pay the tax. By virtue of a separate federal statute, the Department of the Interior held the power to collect the tax for the Nation. *Id.* at 810-12. Moreover, in

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[12] Felix S. Cohen observed that "there are important fields in which Oklahoma Indians have received distinctive treatment and which present distinctive legal problems. These fields include...property laws affecting the Five Civilized Tribes [including the Creek Nation], taxation...." Felix S. Cohen, *Handbook of Federal Indian Law*, 425 (1942 Ed.) (Chapter 23, "Special Laws Relating to Oklahoma").

Maxey, the attorneys' activities were on lands owned by the Creek Nation, subject to restrictions on alienation. *Id.* at 811.

This Congressional intent was bolstered because the nonmember in *Buster* entered the Creek Reservation to do business with notice of the tribal power over the lands in question. Consequently, *Buster* may reflect a very fact-specific consensual relationship. *See Strate*, 520 U.S. at 457.

Here, the Navajo Nation can point to no treaty or congressional act that serves to take Atkinson Trading Company's lands out of the general rule in *Bates v. Clark*. The 1934 Arizona Boundary Act, 48 Stat. 960, that extended the Navajo Reservation to include lands in the vicinity of Cameron Trading Post, contains nothing that would support the exercise of tribal jurisdiction over those nonmember owned fee lands. And, Atkinson Trading Company clearly had no notice of the potential assertion of tribal taxing power when it acquired the lands well before 1934, hence, there can be no consensual relationship, even under a *Buster* analysis. Given that the Navajo Nation lacks any inherent power over Atkinson Trading Company, the Court should reverse the decision below.

3. Recent Congressional action—defining federal and state criminal jurisdictional boundaries—cannot change widely held historical understandings concerning tribal civil jurisdiction over nonmembers.

The decision below improperly attempts to support its analysis by references to the definition of "Indian country" for criminal jurisdictional purposes. *See* 210 F.3d at 1257. In 1948, Congress enacted a statutory definition of "Indian country" for purposes of drawing the line between federal and state jurisdiction over certain crimes under the Major Crimes Act. *See* 18 U.S.C. § 1151 (2000). In that definition, Congress chose, for criminal jurisdiction purposes (but as between the federal government and states only), to uncouple

the direct relationship between title and jurisdiction. In some respects, the Major Crimes Act codified the results in certain decisions of this Court regarding whether states or the federal government enjoyed prosecutorial powers. *See, e.g., Donnelly v. United States*, 228 U.S. 243, 269 (1913) (lands within a reservation legal title to which is held by the United States were "Indian country"); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (Pueblo lands subject to restrictions on alienation were "Indian country"); *United States v. Pelican*, 232 U.S. 442, 449 (1914) (allotted lands were "Indian country"); and *United States v. McGowan*, 302 U.S. 535, 539 (1938) (lands validly set apart for the use of the Indians and under the superintendence of the United States were "Indian country").

However, those decisions did not address whether Indian tribes themselves might have civil or criminal jurisdiction over nonmember fee lands or lands subject to federally-granted rights-of-way or over activities of nonmembers on those lands. Moreover, Section 1151(a) neither granted nor confirmed tribal civil jurisdiction over nonmember activities on nonmember lands or rights-of-way. *See Solem v. Bartlett*, 465 U.S. 463, 468 (1984) ("only in 1948 did Congress uncouple reservation status from Indian ownership and statutorily define Indian country to include lands held in fee by non-Indians within reservation bounardies"); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 & n.16 (1962).[13] While Congress' choice may have made sense to allocate prosecutorial prerogatives between state and federal governments, it does not justify employing a criminal statute to overturn this Court's historic decisions

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[13] *United States v. Baker*, 894 F.2d 1144, 1149 (10th Cir. 1990), relied upon by the court below, *see* 210 F.3d at 1258, is consistent with this conclusion. *Baker*, an appeal of a conviction in a criminal case, presented the question whether a state court had jurisdiction to issue a search warrant.

regarding the civil jurisdictional powers of tribes over non-members.

This Court has suggested that Congress' definition of "Indian country," can apply in the context of assertions of tribal civil jurisdiction. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). (*Venetie* is not pertinent on the point presented here because that case addressed tribal, not nonmember, lands.) In any event, some lower courts have extended that proposition far beyond what *amicus* submits is appropriate. *See, e.g., Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1542 (10th Cir. 1995) ("We hold § 1151 represents an express Congressional delegation of civil authority over Indian country to the tribes."). Such holdings cannot be squared with this Court's decisions in *Brendale*, *Montana*, and *Strate*. The result in those cases would have been exactly the opposite were Section 1151 to define the limits of tribal power in the civil context. Therefore, the court below erred when it stated that the definition of "Indian country" reflected in 18 U.S.C. § 1151 resolves the inquiry presented here. *See* 210 F.3d at 1257-58.[14]

The decision below also misunderstands the Court's reference in *Montana* to Section 1151. In *Montana*, the Court, in the context of the hunting and fishing regulatory issue presented, stated: "If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians [in 18 U.S.C. § 1165, prohibiting hunting and fishing on tribal lands, without lawful authority or permission from the tribe], it

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[14] The Tenth Circuit's citation to *Seymour v. Superintendent* and to Justice Blackmun's dissent in *Hagen v. Utah*, 510 U.S. 399, 425-26 (1994), provide no support for the court of appeal's decision. *See* 210 F.3d at 1257. Those decisions were rendered in criminal matters involving *habeas corpus* petitions challenging the criminal jurisdiction of state courts.

could have easily done so by incorporating in § 1165 the definition of 'Indian country' in 18 U.S.C. § 1151." *Montana*, 450 U.S. at 563. The Tenth Circuit misinterpreted the significance of this discussion. *See* 210 F. 3d at 1258 n.10. Rather than supporting the notion that 18 U.S.C. § 1151 somehow defines the geographic scope of a tribe's jurisdiction, the Court's quoted comment in *Montana* is an acknowledgment that Congress has the power to delegate regulatory authority to Indian tribes, but chose to exercise it in a limited fashion there—to apply only to trust lands, lands subject to restrictions on alienation and other lands reserved for Indian use. *See* 18 U.S.C. § 1165 (2000).[15] 18 U.S.C. § 1151 and its definition of "Indian country" for criminal jurisdiction purposes do not have the talismanic effect in the civil context as suggested by the Tenth Circuit.

Congress has demonstrated an ability to delegate powers in a variety of contexts, and has the power to define the geographic scope of those delegated powers in a way that may be appropriately tailored to the subject matter. *See e.g.*, 33 U.S.C. § 1377 (1994) (authorizing delegation to tribes of Clean Water Act regulatory power). And, Congress has chosen not to act in other circumstances. *See, e.g.*, *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 150-51 (D.C. Cir. 1996) (rejecting the United States Environmental Protection Agency's effort to delegate regulatory authority under the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901-6992 (1994), to an Indian tribe given the absence of

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[15] The legislative history of 18 U.S.C. § 1165 clearly reflects that the reference to "lawful authority or permission" was intended to authorize tribes to enact and apply regulations conditioning entry to tribal lands only. *See* S. Rep. No. 1686, 86th Cong. 2d Sess. (1960); *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 534-35 (D.Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir.), *cert. denied*, 459 U.S. 1070 (1982); *United States v. Pollmann*, 364 F. Supp. 995, 1001 (S.D. Mont. 1973); *cf. United States v. Von Murdock*, 132 F.3d 534, 535 (10th Cir. 1997).

Congressional action). The Court should clarify that 18 U.S.C. § 1151 relates solely to the determination of whether a state or the federal government has criminal jurisdiction over major crimes, and that Congress must act specifically to delegate federal powers to Indian tribes.

The Court's decisions for over a century repudiate unequivocally the Tenth Circuit's efforts to relegate land status to just another factor affecting tribal powers over nonmembers. The Court should reverse the decision below to retain the clarifying power of its land status jurisprudence.

II. THE COURT OF APPEALS' APPLICATION OF THE *MONTANA* EXCEPTIONS CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *MONTANA* AND *STRATE*.

This Court's opinion in *Strate* reviewed exhaustively the sources and proper application of the two exceptions to "*Montana*'s main rule." 520 U.S. at 459 n. 14. With respect to the consensual relationship exception, the Court explained that the jurisdictional assertion must be directly related to and arise out of the consensual relationship to which the nonmember is a party. Although A-1 Contractors had a consensual relationship with the Three Affiliated Tribes of the Fort Berthold Reservation, the Court determined that the Tribes lacked adjudicatory jurisdiction because the tribal court plaintiff "'was not a party to the subcontract, and the [T]ribes were strangers to the accident.'" 520 U.S. at 457, *quoting* 76 F.3d at 940. Applied to the present controversy, these views lead ineluctably to the conclusion that the Navajo Nation lacks jurisdiction to impose its Hotel Occupancy Tax on casual visitors to, and guests of, Atkinson Trading Company, which operates exclusively on nonmember fee lands or their equivalent. Those visitors have no consensual relationship with the Navajo Nation.

The signal from the Court in *Strate*, however, was misunderstood by the court below and threatens to blur the clarity of the Court's jurisprudence on this question. Accordingly, this Court should clarify that its decisions prescribe a clear and unequivocal rule regarding the consensual relationships that satisfy *Montana's* first exception: there must be a contractual relationship between the person assertedly subject to tribal jurisdiction and the tribe (or, in an appropriate case, tribal member) asserting tribal jurisdiction, the relationship must reflect knowing consent, and the assertion of tribal power must relate to the subject matter of the consensual relationship.

Strate provides the clearest application of this rule. While A-1 Contractors had a contractual agreement to work on a project for a tribal entity, that consensual relationship did not satisfy *Montana's* first exception because the Three Affiliated Tribes "were strangers to the accident." 520 U.S. at 457. Here, the tax is imposed on guests of Atkinson Trading who concededly have no contractual arrangements with the Navajo Nation: their only dealings are with Atkinson Trading. Under *Strate*, Atkinson's dealings with individual tribal members are irrelevant. *See id.* Similarly, railroads' rights-of-way granted by the United States, even when consented to by a tribe, are not relationships that satisfy *Montana's* first exception. *See Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000).

The decision below represents a significant misapplication of the two exceptions described in *Montana* and examined in *Strate*. Despite the Court's guidance in *Strate*, the court below used the services that the Navajo Nation may provide to the Trading Company and its guests, including police, fire, emergency medical and tourist services, tó construct a "consensual relationship" supporting Navajo Nation taxation of the guests. In essence, the decision below sanctions a form

of jurisdictional adverse possession: if a tribe makes services available, it can tax and regulate. *See* 210 F.3d at 1261-62. The decision below opens the door wide to analyses that would permit virtually any relationship regardless of how remote to support tribal jurisdiction. That approach drains any meaning from this Court's decision in *Strate* and its effort to provide predictability and a clear rule to govern when a consensual relationship would support tribal jurisdiction.[16]

In contrast, the Court of Appeals for the Ninth Circuit understood and correctly applied *Strate* in reaching its

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[16] The decision below similarly embraces a broad interpretation of the second *Montana* exception. Neither the district court nor the court of appeals ruled upon the merits of the second *Montana* exception, concerning impacts on health and welfare or political integrity, in this case. However, the courts below (the district court and the Navajo Nation Supreme Court) suggested an interpretation of the second *Montana* exception that would swallow the general rule that tribes lack jurisdiction. In footnote 8, the Tenth Circuit stated:

> . . . the power to tax might arise from the second "significant-impacts" exception to the *Montana* rule. In fact, the Navajo Supreme Court held as much, concluding that "[t]axation, that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity." R., Vol. II at 702. The district court appeared to condone the Navajo Supreme Court's conclusion, stating that "[c]onsideration of the other half of the *Montana* test, the significant impacts factor, in an appropriate case may be sufficient to allow the tribe to impose its tax."

210 F.3d at 1254 n.8. However, *Montana* requires that the nonmember "*conduct* threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566 (emphasis added.) The decision below focuses not on the nonmember conduct, but instead on the tribe's need for revenues from some source to run its government. The comments of the district court and the Navajo Nation Supreme Court would appear to allow a tribe to impose a tax on the fee lands activities of nonmembers solely because tribal taxation is integral to a tribe's political integrity. This circular reasoning is wholly at odds with the Court's instruction that the Montana exceptions be narrowly construed and applied.

decision in *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). There, following *Strate*, the Ninth Circuit concluded properly that the Crow Tribe lacked jurisdiction to impose an *ad valorem* tax on the right-of-way properties of Big Horn since the consensual relationships Big Horn had entered with tribal members for the provision of electric services bore no relationship to the tax on utility assets the Tribe sought to impose. *Id.* at 951. In so holding, the Ninth Circuit overruled its decision in *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), which had upheld tribal taxation of railroad rights-of-way. *Big Horn*, 219 F.3d at 953. The Ninth Circuit's conclusion that there is no consensual relationship supporting a tax on the value of railroad rights-of-way and attached properties is clearly correct under *Strate*.

The decision below turns the proper analysis of ascertaining whether tribes have taxing jurisdiction on its head. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819), where Chief Justice Marshall stated: "All subjects over which the sovereign power . . . extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." Rather than first determining that a tribe has the power to tax, the court below has determined that where a tribe has governmental needs to be funded, it has the power to tax.

In *Strate*, Justice Ginsberg, writing for a unanimous Court, equated the scope of a tribal court's jurisdiction to the scope of an Indian tribe's legislative jurisdiction: "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. at 453. While the issue presented in *Strate* related to tribal court jurisdiction, the rationale and statements of the Court clearly demonstrate that its analysis is applicable equally to the attempted exercise of tribal civil regulatory and taxing jurisdiction over nonmembers activities and property on

nonmember fee lands and federally-granted rights-of-way within reservations.

III. THE COURT OF APPEALS' "SLIDING SCALE" ANALYSIS WOULD DEPRIVE PERSONS PRESENT ON INDIAN RESERVATIONS OF PREDICTABLE JURISDICTIONAL GUIDE-LINES, AND WOULD ENGENDER TRIBAL TAXES UNRELATED TO NONMEMBERS' CONSENT.

The "sliding scale" or balancing test proposed by the Court below will undo fundamental propositions of federal Indian law that define the scope of tribal powers over nonmember activities on nonmember lands, and will yield a confused and unpredictable environment for nonmembers—whether they may be "passing through" or seeking to pursue productive economic activity on reservation lands. Such an approach is particularly troubling for enterprises such as interstate railroads and pipelines, which have significant investments that cannot easily be moved in the face of a hostile regulatory or taxing environment.

Given that Indian tribes retain limited sovereignty, it would indeed be ironic for tribes to have the authority to impose burdensome and costly taxes on nonmembers whose activities are on fee lands or their equivalent whenever the tribe arguably could provide services or "the benefits of a civilized society" to the nonmembers. *See* 210 F.3d at 1263. Given the absence of constitutional and Commerce Clause limitations on tribal taxation, s*ee Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 191-92 (1989) (Commerce Clause); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978) (Constitution), tribal taxation in the absence of a meaningful consent can be particularly troubling. Many tribal tax schemes are designed carefully in order to shift tax burdens from tribal members to nonmembers. The Court

should reject the analysis of the courts below, confirm that land status remains a critical factor in determining whether a tribe has jurisdiction over nonmembers, and clarify that consensual relationships must, in fact, be consensual—putting the nonmember on clear and unequivocal notice of the prospective tribal jurisdictional assertion. Specifically, for a consensual relationship to qualify as a basis for the assertion of tribal jurisdiction, the relationship must be between the tribe and the person or entity to be regulated, the consent by the nonmember should be clear and contractual, reflecting consent to jurisdiction, and should relate directly to the activity that is the subject of the consensual relationship

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICUS CURIAE* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") respectfully submits this brief in support of the Petitioner, Atkinson Trading Company, Inc., and its efforts to obtain a reversal of the Tenth Circuit Court of Appeals' decision in *Atkinson Trading Company Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000).[1]

INGAA is a non-profit national trade association comprised primarily of interstate natural gas pipeline companies regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act ("NGA").[2] Member companies operate approximately 200,000 miles of natural gas pipelines, together with related facilities, within the United States, and INGAA's members account for more than 90% of all natural gas transported and sold in interstate commerce within the United States.

There are approximately 55 million acres of Indian land located within the United States. As a consequence of the location of this land, a number of INGAA member pipeline companies have portions of their pipeline systems, and certain related pipeline facilities, located within the boundaries of Indian reservations. The routes utilized by these pipeline companies were selected on the basis of engineering and environmental factors, and the natural gas pipelines located along these routes have been designed and

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than amicus curiae and its members, made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and a joint letter evidencing their consent is on file with the Office of the Clerk of this Court.

[2] 15 U.S.C. § 717 et seq.

constructed to effectively transport natural gas within the United States from areas of production to areas of use. The efficient and uninterrupted accomplishment of this transportation function is essential to both the economic well being of the United States and the physical well being of the vast majority of its citizens. Because of the nature of the business carried out by the members of INGAA, and the importance of that business to our country, the transportation activities and the operational functions of INGAA's members are subject to extensive oversight by FERC.

For those pipelines which pass through Indian reservations, INGAA's members are required by federal law to obtain from the United States grants of rights-of-way over those tracts of Indian land which lie within the pipeline route. Most often, these rights-of-way are granted under the authority of the General Right-of-Way Act of 1948. 25 U.S.C. § 323 *et seq.* Tribal governments often assert jurisdictional authority over the on-Reservation portion of these pipelines. One area of jurisdictional authority of particular interest to INGAA and its members is the asserted power of Indian tribes to levy and collect taxes on those pipelines and pipeline facilities located within the exterior boundaries of Indian reservations. As captive taxpayers who are unable to easily relocate their natural gas pipelines, the level and extent of tribal taxation is of particular importance to those members of INGAA who are subject to tribal taxes. Thus, any decision which appears to expand the scope of a tribe's taxing authority, particularly one that allows or supports the right of a tribe to tax a non-Indian pipeline or activity which occurs within or upon non-Indian owned fee land or its equivalent, is of critical importance to INGAA.

INGAA has a substantial interest in seeing the Tenth Circuit's decision herein reversed for a number of reasons. INGAA, as a national trade association, has a strong interest in ensuring that its members are subject to taxation only

where the taxing entity possesses the proper jurisdictional authority and power to tax. INGAA believes that this Court's precedent establishes that Indian tribes lack the jurisdictional authority to tax a non-Indian party in connection with business activity taking place on fee land or its equivalent and not significantly involving a tribe or its members except under certainly narrowly defined circumstances. *Montana v. United States*, 450 U.S. 544 (1981). Since the Court has determined, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that federal rights-of-way granted to non-Indians are to be equated with fee lands for purposes of determining tribal jurisdiction, INGAA has a direct interest in any case which would extend a tribe's taxing authority over non-Indians conducting activities on fee land or its equivalent.

INGAA also seeks confirmation for its members, and indeed for all non-Indian parties who conduct business on fee property or its equivalent within an Indian reservation, that the taxing jurisdiction of an Indian tribe is synonymous with, but not superior to other jurisdictional powers possessed by a tribe. The Ninth Circuit Court of Appeals, in *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), carefully and correctly applied this Court's precedent regarding the exercise of a tribe's jurisdiction over non-Indian parties and concluded that an Indian tribe lacks jurisdiction to impose a tax on the interests of a utility located within a federally granted right-of-way across Indian trust lands. The Tenth Circuit's inconsistent decision in this regard is reflective of, and results from, an incorrect jurisdictional analysis which ignored the clear standards which this Court has laid out for determining tribal jurisdiction over non-Indians.

INGAA's members have pipelines located in both the Ninth and Tenth Circuits, as well as in circuits which have not yet considered, in light of *Strate*, the jurisdictional authority of an Indian tribe to tax a non-Indian party doing

business within reservations on fee property or its jurisdictional equivalent. It is of great importance to INGAA's members that all federal courts properly apply the straight-forward jurisdictional guidelines developed by the Court's holding in cases like *Montana*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Strate*. This confirmation will help to insure consistency in any analysis of the extent and nature of tribal jurisdiction to which a non-Indian party may properly be subject, whether it be jurisdiction to tax, to zone, to license or to adjudicate disputes.

The Tenth Circuit's holding in *Atkinson* that the Navajo Tribe can tax non-Indian guests staying at a hotel on non-Indian land, and the jurisdictional inquiry undertaken to reach this conclusion, failed to consider the important jurisdictional limitations which apply to tribal action involving fee lands or their equivalent. The Tenth Circuit's analysis in *Atkinson* is inconsistent not only with the precedent of this Court, but also with the Ninth Circuit Court of Appeals decision in *Big Horn County Electric Cooperative*. INGAA thus has an interest in, and supports the efforts of the Petitioner herein to obtain a reversal of the Tenth Circuit's decision.

SUMMARY OF ARGUMENT

This Court's previous decisions establish that any governmental entity seeking to impose a tax must have jurisdiction over the property or activity being taxed before the tax is valid and enforceable. The precedent of this Court over the last 20 years, coupled with the decisions of other federal courts which have properly applied the precedent of this Court, has served to clarify, and set within more narrow and precise boundaries, the extent to which an Indian tribe may assert any form of civil jurisdiction, including jurisdiction to tax, over a non-Indian party doing business upon on-reservation, non-Indian fee land or its equivalent.

The Tenth Circuit's unique balancing test for determining the scope of a tribe's taxing authority over non-Indians who are engaged in activity on fee lands or its equivalent cannot be reconciled with the decisions of this Court, nor decisions of other federal courts which have considered the jurisdictional authority of tribes in contexts similar to that presented in *Atkinson*. The Tenth Circuit's balancing test seemingly will allow tribes to tax non-Indian parties under an inquiry that gives little consideration to the principles that have been at the center of this Court's Indian jurisdiction cases, while at the same time considering, for purposes of jurisdiction, the asserted needs for, and/or uses to be made of, tribal tax revenue. Such a test would legitimize the notion that a tribe can "earn" jurisdictional authority to impose a tribal tax on a non-Indian party by the appropriate utilization of the tax revenue received, or by implementing a tax with a tax rate small enough to escape a "finding" that the tax creates a "disproportionate" burden on the taxpayer. Such a determination lacks support in the law and highlights the Tenth Circuit's failure to adequately consider the threshold issue of whether the Navajo Tribe had jurisdiction to tax Atkinson in light of this Court's clear and overriding rules concerning the scope of tribal jurisdiction over non-Indians. The Tenth Circuit's failure to properly apply this Court's precedent and the practical implications of what its "balancing test" will mean justifies reversal by this Court.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE TENTH CIRCUIT BECAUSE IT FAILED TO CONDUCT A PROPER INQUIRY INTO WHETHER THE NAVAJO NATION HAD JURISDICTION TO IMPOSE ITS TAX

A. The Power to Tax Cannot Be Exercised Over Persons or Property Located Outside The Jurisdiction of a Tribe

INGAA recognizes that the right of a tribe to tax "transactions occurring on trust lands and significantly involving a tribe or its members" is an essential element of a tribe's inherent sovereignty. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980). This power provides a means for funding essential governmental services while also serving as a tool for territorial management. *See Merrion v. Jicarilla Apache Tribe*, 455, U.S. 130, 137 (1982). However, this power, like all sovereign powers of a tribe, is limited in scope, and extends only to the limits of a tribe's jurisdictional authority.

The power of a sovereign to tax was considered nearly two centuries ago by this Court in *M'Culloch v. State of Maryland*, 17 U.S. (4 *Wheat*) 316, 429 (1819), wherein Chief Justice Marshall noted:

> It is obvious, that it (the power to tax) is an incident of sovereignty, and is coextensive with that to which it is an incident. *All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.* This proposition may almost be pronounced self-evident. (Emphasis added.)

Similar pronouncements have been repeated as this Court has analyzed the taxing jurisdiction of various governmental

entities. *See, Louisville & Jeffersonville Ferry Company v. Commonwealth of Kentucky*, 18 U.S. 385, ____, 23 S.Ct. 463, 467 (1903) ("While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government.")

This point was particularly well made in *St. Louis v. The Ferry Company*, 78 U.S. (11 Wall) 423, 430 (1870), wherein this Court stated:

> Where there is jurisdiction neither as to the person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. *Jurisdiction is as necessary to a valid legislative as to valid judicial action.* (Emphasis added.)

The above rulings by the Court establish a number of important considerations in considering the scope of any government's power to tax. First, and foremost, the power to tax is subject to jurisdictional limitations which must be satisfied before a tax may properly be imposed. Where the requisite jurisdiction is lacking, so, too, is the power to tax. In addition, it is clear from the rulings of the Court that the power to tax is a legislative power and thus is subject to those jurisdictional limitations which apply to legislative actions. The power to tax is but one of the sovereign powers of a tribe and as such it is subject to the jurisdictional limitations which have been applied to tribes in their efforts to assert civil jurisdiction over non-Indians. Proper application of these

jurisdictional limitations evidences that the general civil jurisdiction of a tribe does not extend to non-Indian parties who are engaged in business activities on fee lands or its equivalent within a reservation. Consequently, the power to tax such activities, which is co-extensive with, but not superior to the other jurisdictional powers of a tribe, is lacking.

B. This Court Has Set Forth a Straightforward Approach to Determine Whether an Indian Tribe May Properly Exercise Civil Jurisdiction, Including Taxing Jurisdiction, Over Non-Indian Parties Engaged in Business Activities on Non-Indian Owned Land Or Its Equivalent

Both the nature and the extent of tribal sovereignty have been addressed numerous times in the last two decades by the Court. In reviewing these decisions, a number of controlling principles have developed which lead to the conclusion that the Tenth Circuit's decision in *Atkinson*, and the balancing test formulated therein, improperly deviates from the Court's precedent, misapplies the jurisdictional test set forth in *Montana*, and should therefore be reversed.

In 1981, this Court decided the seminal case of *Montana v. United States*, 450 U.S. 544, which undertook an extensive review of tribal civil jurisdiction over non-Indians, with particular emphasis on tribal attempts to regulate the activity of non-Indians occurring on fee lands. In *Montana*, this Court determined that the Crow Tribe lacked sufficient jurisdiction to regulate the on-reservation hunting and fishing by nonmembers of the Tribe where the activity occurred on fee lands. In reaching its decision, the Court, noting the diminished status of tribes as sovereigns, concluded that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so

cannot survive without express congressional delegation." 450 U.S. at 564. The Court made clear the general proposition that the "inherent sovereign powers of an Indian tribe do not extend to nonmembers of the Tribe." 450 U.S. at 565.

In *Montana*, this Court recognized that tribes may, in certain instances, exercise tribal civil jurisdiction over non-Indians, even where Congress has not expressly authorized such exercise and no specific treaty otherwise guarantees such jurisdiction. These narrowly defined circumstances were described as follows:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. 450 at 565-566 (citations and footnote omitted).

The starting point of any analysis of tribal civil jurisdiction over non-Indians begins with *Montana* and the presumption that in the absence of express Congressional authorization to the contrary, an Indian tribe lacks jurisdiction to assert civil authority over non-Indians related to their activities or property located on fee lands. This presumption also holds true for non-Indians in connection with their activities conducted within or upon lands which are the equivalent of fee lands for jurisdictional purposes. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Therefore, an Indian tribe

which seeks to assert jurisdiction over non-Indians on non-Indian owned fee land or its equivalent has a heavy burden to show that the tribe is not subject to the general presumption that the tribe lacks such jurisdiction.[3]

Another case of particular relevance is *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion*, this Court considered the Jicarilla Apache Tribe's right to enforce a severance tax against non-Indian oil companies on any "oil and natural gas severed, saved and removed from *Tribal* lands . . . ." 455 U.S. at 133 (emphasis added). The Jicarilla Apache Tribe's reservation, located in northwestern New Mexico, is comprised *entirely* of lands held by the United States in trust for the Tribe. *Id.* In upholding the right of the Jicarilla Apache Tribe to impose its severance tax, the Court looked to its prior decision in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), which held that the "power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 152.

In *Merrion*, the non-Indian lessees were found to be within the scope of the Tribe's taxing jurisdiction based on their direct contractual dealings with the Tribe and because all of

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[3] In this regard, this Court's decision in *South Dakota v. Bourland*, 508 U.S. 679 (1993) is instructive, inasmuch as *Bourland* forcefully notes that "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' (citing *Montana*) 450 U.S. at 564, and is therefore *not* inherent." 508 U.S. at 695, n. 15 (emphasis in original). *See also, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 430 (1989) (Opinion of Justice White.) "The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal court, to regulate the use of fee land."

the non-Indian oil company's business within the Reservation was conducted on tribal lands. In the Court's words:

> [A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power. *A tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.* 455 U.S. at 141, 142. (Emphasis added.)

The Court's opinion in *Merrion* repeatedly refers to the "jurisdiction" of the tribe and the need for the taxed activity to be within the tribe's jurisdiction. In *Merrion*, all activities of the non-Indian parties involved took place on Indian trust land pursuant to oil and gas leases entered into directly with the tribe. Given these facts, the Court determined, with three justices dissenting, that tribal jurisdiction to tax did exist. *Merrion*, not surprisingly, contains no reference to *Montana* and the jurisdictional presumption against tribal jurisdiction present in *Montana*. However, it seems self-evident that this omission resulted from the factual circumstances in *Merrion*, and not because of any unique or special treatment given by the Court to the taxing power of a tribe. Where, as in *Merrion*, the activity to be taxed involves activities directly involving a tribe and occurring only on Indian trust land, *Montana* has no factual application.

The most recent decision of this Court directly governing the issues in this case is the unanimous opinion in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *Strate* soundly reaffirmed the *Montana* analysis for considering the scope of

tribal "civil authority" over non-Indians. *Id.* at 446. In addressing the adjudicatory jurisdiction of tribes over non-Indians on non-Indian fee land or its equivalent, this Court amplified on the broad application of *Montana*, stating:

> While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of "inherent sovereignty." Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non-Indians." As to nonmembers, we hold, *a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.* Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. *Subject to controlling provisions in treaties and statutes, and the two exceptions identified in Montana, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "does not extend to the activities of nonmembers of the tribe."* 520 U.S. at 438 (internal citations to *Montana v. United States* omitted). (Emphasis added.)

The power to tax necessarily flows from a tribe's "legislative jurisdiction" and is thus part of a tribe's "civil authority." However, *Montana* in plain and unambiguous terms made clear that the inherent sovereign powers of a tribe do not, in general, extend to non-member activity on non-Indian owned fee land. *Bourland* brought this point home by concisely stating that in the absence of express Congressional delegation, tribal sovereignty over non-Indians is not inherent. *Strate* further reinforces this principle both as to fee land and its equivalent. Since a tribe's taxing authority is merely one of the legislative powers which comprise a tribe's civil authority, and because the power to tax exists only where the taxing entity has jurisdiction over the activity,

person or property to be taxed, it is clear that the Navajo tribe cannot properly impose its tax on the guests of Atkinson.

C. The Ninth Circuit Court of Appeals' Decision in *Big Horn County Electric Cooperative Inc. v. Adams* Reflects a Proper Application of This Court's Jurisdictional Principles

In *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), the Ninth Circuit was presented with the issue of whether the Crow Tribe of Indians had the jurisdictional authority to assess an ad valorem tax against the utility property of a non-Indian electric cooperative where that property was located within the boundaries of federally granted rights-of-way which had been obtained by the cooperative across Indian lands. The analysis which the Ninth Circuit employed in reaching the determination that the Crow Tribe lacked the necessary jurisdictional authority to impose its tax reflects a proper application of the jurisdictional guidelines provided by this Court.

In *Big Horn County Electric Cooperative*, the Ninth Circuit first recognized the importance of determining whether the Tribe's actions were directed at property located on fee land or its equivalent. As the Ninth Circuit stated, "The United States Supreme Court has stated on several occasions that an Indian tribe's jurisdiction over nonmember conduct on non-Indian fee land is extremely limited." *Id.* at 949. The Ninth Circuit then looked to *Strate* and to another decision of the Ninth Circuit and concluded, consistent with these cases, that the cooperative's federally granted rights-of-way across Indian lands were "the equivalent of non-Indian fee land for the purpose of considering the limits of the Tribe's regulatory jurisdiction." *Id.* at 950.

Having concluded that the Crow Tribe's taxes were thus directed at property located within rights-of-way that were jurisdictionally the equivalent of fee land, the Court then

observed that "post-*Strate* jurisprudence leaves no doubt that *Montana's* framework applies in determining a tribe's jurisdiction over nonmembers on non-Indian fee land." *Id.* The Ninth Circuit then acknowledged that under *Montana's* main rule, "a tribe has no civil regulatory authority over tribal nonmembers." *Id.* at 951. The Court then turned its analysis to the two *Montana* exceptions.

The Ninth Circuit first considered whether the electric cooperative had any consensual relationship which would support the Crow Tribe's taxing efforts, and determined that there existed no consensual relationship of a kind or type required to support the Tribe's tax. The Court then considered whether the second exception outlined in *Montana* would supply the requisite nexus for the Tribe's taxing efforts, and again the Ninth Circuit concluded that this exception was not met. The Ninth Circuit rejected the Crow Tribe's argument that because revenues generated by the tax financed important tribal services, the tax was essential to the Tribe's well being and thus fell within the second exception. In considering and rejecting this argument, the Ninth Circuit noted that this Court has indicated that the second *Montana* exception is to be narrowly construed, and that the Tribe's "request for us to expand *Montana's* second exception would effectively swallow *Montana's* main rule, because virtually any tribal tax would thus fall under the second exception, a result that the Supreme Court has never endorsed and which conflicts with the Supreme Court's view that tribal jurisdiction is limited." 219 F.3d at 951.

Finally, citing *Merrion* and *Washington v. Confederated Tribes of the Colville Indian Reservation* the Ninth Circuit rejected the Crow Tribe's argument that its inherent sovereign authority permitted the Tribe to impose its tax free of the *Montana* rule. In rejecting this argument, the Ninth Circuit noted that while "both cases contain broad language regarding tribal taxation powers, neither case abrogates

Montana's main rule." 219 F.3d at 952. In its analysis of these cases, the Ninth Circuit noted that both cases focused on the power of a tribe to tax property or activity occurring on Indian land, and that both cases actually contain language lending support to the proposition that an attempt to reach beyond tribal lands would be an "impermissible extension of tribal jurisdiction." The Ninth Circuit further concluded that the reference to several taxation cases in the *Montana* opinion effectively undercut any argument that tax cases were somehow not subject to *Montana's* main rule.

The Ninth Circuit's decision in *Big Horn County Electric Cooperative* illustrates the correct analysis that should be undertaken by a court presented with the issue of whether a tribe's jurisdiction to tax can be extended to non-Indians doing business on non-Indian lands within a reservation. Such an analysis squares with the principles on tribal jurisdiction which have been articulated and clarified by decisions of this Court over the last 20 years. Clearly, the Tenth Circuit's meandering and disjointed analysis bears little resemblance to the Ninth Circuit's straightforward application of the decisions of this Court. The Tenth Circuit's opinion plainly highlights the dangers of straying from the proper application of *Montana's* "pathmarking" analysis.

D. The Tenth Circuit's Analysis in *Atkinson* is Fatally Flawed And The Balancing Test Advanced Therein Cannot Be Reconciled With *Montana* And Its Progeny

The Petitioner, in the Legal Argument portion of its brief, has well demonstrated the legal errors in the analysis employed by the Tenth Circuit. Each of the errors noted by the Petitioner in and of itself are sufficient to justify a reversal of the Tenth Circuit, and collectively they demonstrate plainly the confusion and unending promise of continuing litigation that will certainly flow from the Tenth Circuit's

failure in *Atkinson* to follow the clear legal precedents established by this Court.

The Tenth Circuit found a consensual relationship existing between Atkinson's lodgers and the Navajo Tribe based on a theory of implied consent. *Atkinson*, 210 F.3d at 1261-1263. According to the Tenth Circuit, those lodgers consented to the jurisdiction of the Tribe by their mere presence on the Navajo Reservation. If that were true, then there is no need to conduct the *Montana* analysis in the first place, since any exercise of jurisdiction by a tribe directed against nonmembers found within the exterior boundaries of a reservation would seemingly be authorized simply by their being located within the Reservation. *Montana's* main rule cannot be so easily sidestepped or its consensual relationship exception so broadly expanded. Plainly, if the implied consent notion were an appropriate concept for determining jurisdiction, the outcome of *Montana, Brendale, Bourland* and *Strate* would have been different.

A similar problem exists with the Tenth Circuit's reliance upon the "Indian country" definition of 18 U.S.C. § 1151 to support its conclusion that "Congress, in the exercise of its plenary authority, has determined that all lands within the outer bounds of the reservation are within Indian County and are therefore subject to reasonable tribal authority." *Atkinson*, 210 F.3d at 1258. This statement again evidences a clear misunderstanding of the nature of this federal statute, as well as disregard for the teachings of *Montana* and its progeny. The purpose of 18 U.S.C. § 1151, as enacted by Congress, was to determine the scope of federal criminal jurisdiction. Thus, this statute evidences no Congressional intent whatsoever to extend tribal *civil* jurisdiction to all non-Indians within a Reservation. Further, *Montana*, *Bourland*, *Brendale*, and *Strate* each support the proposition that non-Indian owned fee land is not, solely by virtue of its location within a reservation, subject to "reasonable tribal authority."

In fact, each holds quite to the contrary. Once again, *Montana's* main rule may not be so easily avoided. Clearly 18 U.S.C. § 1151 has no application to the issue in this case.

The Tenth Circuit's balancing test also fails to comport with this Court's jurisprudence on tribal civil jurisdiction over non-Indians. If the Tenth Circuit's decision is permitted to stand, tribal jurisdiction over non-Indians may seemingly be exerted wherever or whenever a tribe can point to some potential benefits flowing from the Tribe to the party being impacted by tribal action. This test, in practical effect, ignores the *Montana* rule and its exceptions, and replaces them with a test which, in all but the most egregious situations, would support tribal jurisdiction.

The decisions of this Court on Indian jurisdiction over non-Indians cannot be squared with the analysis of the Tenth Circuit. Furthermore, the Tenth Circuit's balancing test, if upheld, will effectively overrule those principles of Indian jurisdiction which have been developed by this Court to clearly limit the scope of tribal jurisdiction over non-Indian parties. Under current law tribes are presumed to lack the power to impose taxes or otherwise assert civil jurisdictional authority over non-Indians relative to activities occurring on non-Indian owned fee land or its equivalent. The decision of the Tenth Circuit deviated from the settled law of this Court, and thus should be reversed.

CONCLUSION

The balancing test adopted by the Tenth Circuit to determine whether a tribe should be allowed to tax a non-Indian party begs the question of whether there exists tribal jurisdiction to support such action in the first instance. To conclude that a tribe can impose a tax based, even in part, upon the benefits to be obtained from the revenue generated by the tax, brings into the jurisdictional inquiry matters which have no bearing on jurisdiction, and suggests that jurisdiction

can be earned by the taxing entity provided the entity makes proper use of the tax revenues it receives. Under the analytical framework set forth by this Court, as properly applied by the Ninth Circuit Court of Appeals in *Big Horn County Electric Cooperative*, it is clear that the Tenth Circuit's analysis was flawed and failed to examine the jurisdictional reach of the Tribe's taxing power in light of the clear limitations which this Court has defined in regard to such power. For the reasons stated above, this Court should reverse the Tenth Circuit's decision.

Respectfully submitted,

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Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PROPER ECONOMIC RESOURCE MANAGEMENT, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an Indian tribe may tax a transaction occurring between non-Indians on fee land within the reservation?

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INTEREST OF AMICUS CURIAE

The Amicus Curiae,[1] Proper Economic Resource Management, Inc. ("PERM") is a Minnesota non-profit corporation with approximately 1,000 members. PERM is involved in protecting and advancing the private property interests and rights of all citizens, including both members and non-members of Indian tribes. PERM is interested and involved in natural resource management policies, which balance economic growth and conservation of natural resources. PERM has a critical interest in this case because it has members who own residential, recreational and commercial land and businesses within the original boundaries of various Indian reservations in the State of Minnesota. The actions of tribal governments, whether through regulation or taxation, have impacted and have the potential to impact the fee owned lands and businesses of Minnesota citizens and the fundamental rights of individuals who are not members of tribal governments.

All parties have consented by joint written stipulation to the filing of this Amicus Brief.

SUMMARY OF THE ARGUMENT

The decision by the 10th Circuit Court of Appeals in *Atkinson Trading Company, Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000) creates substantial concern for PERM and its members because that decision failed to apply the analysis of this Court from *Montana v. United States*, 450 U.S. 544 (1981). PERM submits that this Court must reverse the 10th Circuit's decision in *Atkinson Trading*, and apply *Montana's*

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[1] Pursuant to Rule 37.6 of this Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, their members or its counsel have made any monetary contribution to the preparation or submission of this brief.

general rule that Indian tribes lack authority over non-member activity on fee lands. Because the two exceptions to *Montana's* general rule are narrowly drawn, there can be no circumstance in which tribal taxation of non-member activities is permissible unless the activity occurs on tribal lands.

The 1,000 members of PERM include persons who own residential, recreational and commercial fee land, and operate related businesses, within the boundaries of several original reservations in Minnesota. Fee land ownership in those areas resulted from the United States Congress assimilation policy, as carried out in the General Allotment Act [Dawes Act], 24 Stat. 390 (1887), as amended, 25 U.S.C. §1331, *et seq.*, and other statutes and agreements, including the Nelson Act, 25 Stat. 642 (1889). The 10th Circuit's decision in *Atkinson Trading* fails to recognize fee ownership as the determinative factor, and creates a new balancing test that would improperly expand tribal taxation authority over non-member activities contrary to *Montana* and the fundamental rights of non-members.

Fee lands owned by non-members within the boundaries of a reservation are not subject to inherent tribal sovereignty and control. Absent an express delegation of authority by Congress, tribal sovereignty over non-members is not inherent; the only exceptions are to protect tribal self-government or to control internal relations. *See South Dakota v. Bourland,* 508 U.S. 679,694-95 (1993). The Congressional policy that created fee ownership within reservations was diametrically opposed to the grant of tribal jurisdiction over non-members. The assimilation policy that created fee land ownership was designed to break up tribal relations and made tribal members and their allotted fee lands subject to state laws and taxation. *See County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251,254-56 (1992).

Minnesota has a checkerboard of fee land ownership in the original reservations. Non-members owning fee lands are threatened by tribal regulation and taxation by tribal governments in which non-members cannot participate, even if the non-member resides on the land. The resulting uncertainty damages businesses and land values. The fundamental rights of non-members, as United States citizens, are violated by tribal government regulation and taxation. Tribal regulation and taxation are divisive forces in local communities and injurious to economic development. This Court must limit tribal taxation power over non-members to activities occurring on tribal lands, consistent with this Court's decisions in *Montana* and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

ARGUMENT

I. TO PREVENT CONTINUED UNCERTAINTY, *MONTANA'S* GENERAL RULE MUST BE APPLIED AND STRENGTHENED.

The original Ojibwe (Chippewa) Indian reservations in Minnesota present in a microcosm the variety of "reservations" that exist across the United States. By understanding the circumstances in Minnesota, the Court may better understand that while reservations differ, the impact of the Court's decisions on non-members owning fee land is universal. The Red Lake Reservation in Minnesota was never ceded to the United States, and except for a few minor exceptions, the aboriginal title remains in the Red Lake Band of Chippewa. White Earth Reservation is a checkerboard consisting of non-Indian and Indian owned fee lands, plus some trust lands and fee lands owned by the White Earth Band.

All other Minnesota Chippewa reservations, including the Grand Portage Reservation, the Boise Forte Reservation,

the Leech Lake Reservation and the Fond du Lac Reservation, were ceded and relinquished to the United States under the Nelson Act, 25 Stat. 642 (1889) and by agreement with the various Chippewa bands. These four "reservations" also feature a checkerboard of ownership of fee land owned by members and non-members, state, federal and local government lands, and tribal trust lands and tribal owned fee lands.[2] Tribal governments on the one hand, and non-members and state and local governments on the other, differ as to whether these four Chippewa reservations remain intact or were disestablished or diminished by the Nelson Act.

Last, the original Mille Lacs Reservation was ceded by nearly identical 1863 and 1864 Treaties with the Mille Lacs Band, 12 Stat. 1249 (1863) and 13 Stat. 693 (1864). Later the Mille Lacs Band ceded the right of occupancy under the Nelson Act. This Court held that the Mille Lacs Reservation was ceded and relinquished, and there was a "complete extinguishment of Indian title," *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498,503-04 (1913), and this language is "precisely suited" to reservation disestablishment. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329,330 (1998) *citing DeCoteau v. District County Court*, 420 U.S. 425,445 (1975).

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[2] The actual percentage of land ownership varies widely. Of the original Leech Lake Reservation, less than 5% was owned by the tribe or individual Indians. *See State v. Forge*, 262 N.W. 2d 341,345, n.1 (Minn. 1977). These percentages are reversed at Grand Portage, where the Grand Portage Band or its members own approximately 95% of the land, in trust or in fee. *See Grand Portage Band of Chippewa v. Melby*, Memorandum Opinion and Order, Grand Portage Band of Chippewa Tribal Court of Appeals, #99-001, Feb. 15, 2000, Amicus Appendix A-2. Nationwide, in 1990 nearly one-half of reservation residents were non-Indians. *See* Bureau of the Census, U.S. Department of Commerce, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas* 3 (1990). Two-thirds of Indian lands allotted under the Dawes Act were acquired by non-Indians. *See County of Yakima*, 502 U.S. at 255-56.

Even though courts have determined that the Nelson Act ceded and relinquished all the Chippewa reservations in Minnesota except Red Lake and White Earth, *Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221,226-27 (1986); *Chippewa Indians of Minnesota v. United States*, 88 Ct. Cl. 1,30 (1938-39), *aff'd*, 307 U.S. 1,2 (1939), the Chippewa bands continue to assert that they have jurisdiction over their "territories" which they define to be all lands within the boundaries of the original reservations. *See e.g. Grand Portage Band v. Melby*, Amicus App. A-6, n.12, A-12. This creates uncertainty for non-members who own fee lands that non-members or their predecessors in title have owned for over a century, and on which non-members have built homes and businesses without the assistance of tribal governments.

Until recent times, tribal governments in Minnesota have not attempted to regulate or tax the activities of non-members on fee lands. *See e.g. id.* at A-2, A-3, n.8, A-12. Nevertheless, tribal governments in Minnesota, like many tribal governments across the United States, are viewing expansively the powers of tribal governments over all persons and land within the boundaries of original reservations as part of their "territory" subject to their inherent sovereign powers. *Grand Portage* held that inherent tribal sovereignty included the power to tax and regulate all commercial activity by non-members on fee lands on the reservation, and that all commercial activity by definition is "consensual." *Id.* at A-9.

This Court has previously reined in attempts to expand the power of tribal governments over non-members and fee lands by making clear that *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987) were limited to "a prudential exhaustion rule." *Strate v. A-1 Contractors*, 520 U.S. 438,450 (1997). The general rule in *Montana* applies to non-member activity on fee lands, and the exceptions to *Montana* are to be narrowly read and applied. *See Strate*, 520 U.S. at 445-46. The 10th Circuit's decision in

Atkinson Trading is an erroneous attempt to expand the exceptions to *Montana's* general rule governing tribal taxation of non-member activities on fee lands.

Amicus curiae submit that *Montana's* general rule must be applied without exception to tribal taxation of non-members on fee lands. Otherwise, continued attempts by tribal governments to tax persons who do not have a voice in tribal government will continue to create uncertainty for fee owners, and negatively impact economic development in areas where economic development is sorely needed. The result will be continuing litigation expenses as these issues are tried in tribal and federal courts as tribal governments attempt to raise monies by taxing persons without a voice in tribal government. While there exists a checkerboard of land ownership within reservations, these areas are also communities. To give tribal members of the community the power to regulate and tax their neighbors who are denied participation in tribal government is both unfair and divisive.

Under the Nelson Act, except for the Red Lake and White Earth Reservations, the Chippewa reservations in Minnesota were ceded and relinquished to the United States and tribal members were encouraged to move to White Earth to take their allotments there under the General Allotment Act of 1887. *See Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103,106-07 (1998). Band members who wished to remain on their previous reservations to take their allotments were permitted to do so, and many chose this course of action. *See State v. Forge*, 262 N.W.2d 341,346. The remaining lands were then made available for sale to non-members, and this policy generally stayed in force until the Indian Reorganization Act of 1934, 48 Stat. 984. *See Cass County*, 524 U.S. at 108. In the meantime, under the General Allotment Act and the Burke Act, 34 Stat. 182 (1906), band members who took allotments received fee patents, and many tribal members sold the lands that they owned in fee through the allotment process to non-members.

See e.g. Grand Portage, Amicus App. A-3. This process in Minnesota was remarkably similar to the pattern described by the 8th Circuit Court of Appeals in its decision in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (1999), *cert. denied* 120 S.Ct. 2717 (2000). Over 100 years ago there came to be a new understanding of what constituted tribal lands wherein tribes continued to exercise jurisdiction.

> "At the turn of the century, Indian lands were defined to include 'only those lands which the Indians held some form of property interest: trust lands, individual allotments, and to a more limited degree, opened lands that had not yet been claimed by non-Indians' *Solem*, 465 U.S. at 468. Lands to which the Indians did not have any property rights were never considered Indian Country."

Gaffey, 188 F.3d at 1022. [*citing Solem v. Bartlett*, 465 U.S. 463 (1984)].

Gaffey resolved the issue of tribal claims of jurisdiction over fee lands by determining that the Yankton Sioux Reservation, as a result of the Act of 1884, 28 Stat. 286, was diminished. The 8th Circuit held that the Yankton Sioux Reservation no longer included those lands owned in fee by non-members. *Id.* at 1030. This non-member fee land analysis applied whether the title to that land originated in a fee patent from land ceded to the United States by the Yankton Sioux Tribe, or whether the non-member's fee title to the land originated from an allotment to a tribal member. By eliminating these non-member owned fee lands from the reservation, the Yankton Sioux Reservation was greatly diminished, and the jurisdictional issues were resolved.

What *Gaffey* points to is a recognition by the 8th Circuit of the critical distinction that arises when fee land is owned by non-members. Despite the differences in the status of the various original Chippewa reservations in Minnesota, a single

common thread exists with regard to fee lands. All of the fee land owned by non-members[3] finds its origin in Congressional policies from the assimilation period, beginning with the General Allotment Act [Dawes Act] and continuing with the Nelson Act in Minnesota, and similar acts in other states, and the Burke Act. *See Cass County*, 524 U.S. at 108.

> "The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large . . . Section 6 [of the Dawes Act specified] that 'each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' 24 Stat. 390. [With the passage of the Indian Reorganization Act] Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints upon the ability of Indian allottees to alienate or encumber their fee patented lands **nor impaired the rights of those non-Indians who had**

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[3] The fee land in *Atkinson Trading* is within the boundaries of the Navajo Reservation from anomalous circumstances that parallel the General Allotment Act policy. Rather than the typical patent of fee land under the General Allotment Act from the United States to a non-member of land within the original boundaries of the reservation, *Atkinson Trading* features fee lands which became surrounded by the reservation when the reservation's boundaries were extended. The fee land in *Atkinson Trading* is analogous to the vast majority of fee lands transferred under the General Allotment Act because in both circumstances there was no Congressional policy, or expectation by non-members, that the non-member fee land within a reservation's boundaries would be subject to tribal regulation or taxation.

acquired title to over 2/3 of the Indian lands allotted under the Dawes Act."

County of Yakima, 502 U.S. at 254-56 [emphasis added].

> "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."

Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408,423 (1989), (J. White plurality opinion) *citing Montana*, 450 U.S. at 560, n.9.

The Report of the Commissioner of Indian Affairs, September 21, 1887, stated:

> "After patents have been delivered, the laws of descent and partition of the State or territory in which the lands are located shall apply to said lands . . .
>
> After receiving his patent every allottee shall have the benefit of and be subject to the civil and criminal laws of the State or Territory in which he may reside; and no territory shall deny any Indian equal protection of law; (*Id.* at pages 3-4, *citing* Dawes Act.)

Henry Dawes himself made the following comment regarding the General Allotment Act:

> "I am responsible to the laws of Massachusetts alone; and so is each one of those Indians, henceforth, responsible alone to the laws of the state

in which he lives." Henry Dawes, "Proceedings of the Fifth Annual Meeting of the Lake Mohonk Conference of the Friends of the Indians," 1887, quoted in *Americanizing the American Indians* (Francis Paul Prucha ed., Lincoln: University of Nebraska Press, 1978) p.105.

As Minnesota citizens over the last century purchased lands in these original Chippewa reservations, and built homes and businesses, they did so without any expectation that tribal governments would have any role in regulating or taxing their land or activities. *See generally Gaffey*, 188 F.3d 1022. The settled expectations of all parties were that non-members and their activities on fee lands would be subject to the state and local governments who exercised regulatory and taxing authority, the very bodies politic that these non-members participated in through election and by holding office. *See Cass County*, 524 U.S. at 107-08. Indeed, the expectation under the General Allotment Act was that even tribal members would be subject to state taxation and regulation for their activities on any tribal member fee owned land on the original reservation. *See id.* As this Court has held, while the assimilation policy that created the General Allotment Act and its progeny were ended by the Indian Reorganization Act, Congress never sought to repudiate or undo the effects of the policy that had existed during those fifty years and which had so dramatically changed the face of Indian reservation lands. *See County of Yakima*, 502 U.S. at 254-56.

What is needed is an articulation by this Court of a bright line rule that eliminates any question regarding the scope of tribal regulation over non-member activities on fee lands. This Court in *Brendale*, while badly fractured in its three opinions regarding the scope of tribal zoning jurisdiction over non-member lands, agreed uncertainty would result from case by case determinations. 492 U.S. at 430,448-49,460.

Unfortunately, the failure of the Court in *Brendale* to reach a majority opinion resulted in that outcome. The *Brendale* plurality's approach provides a bright line rule that would eliminate the litigation that continues to reach this Court on these issues.

> "The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Id.* at 430 (J. White plurality opinion).

Amicus curiae PERM submits that the best way to bring certainty to the area of tribal taxation is to hold that *Montana's* general rule applies, without exception, to the taxation of non-member activities on fee lands.

Unless a bright line is drawn, tribal governments and tribal courts will understandably continue to attempt to expand the extent and reach of tribal powers. By limiting tribal regulatory and taxation powers to activities that occur on tribal lands, this Court will accomplish three things: (1) a clear, bright line standard will avoid the uncertainty and cost of litigation for non-members and tribal governments; (2) deference will be accorded to the Congressional intent that resulted in fee lands being owned by non-members within the boundaries of original reservations, consistent with this Court's decisions regarding the extent and reach of the powers of tribal government; and, (3) the rule will protect the fundamental rights, both civil and property, of non-members on their fee lands.

Unquestionably, many original Indian reservations in the United States represent some of the worst pockets of persistent poverty in the United States. As long as uncertainty exists regarding what rights non-members have on their fee owned lands, and how non-members may be impacted by the actions of tribal governments in which those non-members cannot participate, that uncertainty will

continue to create divisions between tribal members and non-members, and discourage the economic development and investment that will benefit both tribal members and non-members. A non-member operating a resort on a Minnesota lake within an original Chippewa reservation will be hesitant to invest in that business and expand its operations if tribal governments can impose taxes on non-member activities. Having no voice in tribal government increases the fear and uncertainty. As long as uncertainty exists, investment dollars will flow to areas in which non-member business activities cannot be diminished or impacted by tribal regulation and taxation. The value of fee owned lands and businesses will diminish, employment opportunities will decline, tourism will be impacted, and both the fee land owner and his Indian neighbors will be negatively impacted. The vast majority of Indian people live away from their reservation homelands[4] at least in part because of the lack of economic activity that can sustain them in those areas.

To avoid the uncertainty of the 10th Circuit's *Atkinson Trading* standard, this Court must hold that *Montana's* main rule applies to taxation. The 10th Circuit's decision in *Atkinson Trading* finds an "implied" consensual relationship between the petitioner's guests and the Tribe, based upon the guest's acceptance of the privilege of remaining on the reservation. Nothing distorts the first *Montana* exception more than finding that a consensual relationship can be "implied." The implied consent analysis fails to recognize that the activity being taxed is not occurring on tribal lands, but on fee lands. While the hotel guest is free to stay elsewhere, the 10th Circuit's analysis in *Atkinson Trading* further fails to recognize that the non-member landowner has no "implied consent" choice because the business location is

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[4] Bureau of the Census, U.S. Department of Commerce, *We the. . . First Americans* 7(1993).

fixed. If the guests avoid "consent" and taxation by staying elsewhere, the fee owner is damaged by the business loss.

Furthermore, to find that there is "implied consent" really means that no consent at all is necessary, that no conscious decision is required to enter into a "consensual relationship" by commercial dealings, contracts, etc. with a tribe or its members. *See Montana*, 450 U.S. at 565-66. At a minimum, the first *Montana* exception requires an express decision to enter into a contractual or other consensual relationship. Moreover, the regulation or taxation must be limited to the scope of the consensual relationship. Otherwise, non-members conducting business on fee lands will be subject to claims of tribal regulation because they incidentally do a small amount of business with tribal members. State anti-discrimination laws prohibit a non-member from refusing to do business with tribal members, negating the "consent" factor. *See e.g.* Minnesota Human Rights Act, Minn. Stat. §363.01 *et seq.* As this Court made clear in *Strate*, the *Montana* exceptions must be narrowly read.

II. FEE LAND OWNERSHIP CONTROLS THE ISSUE OF TRIBAL TAXATION.

The 10th Circuit's decision in *Atkinson Trading* downplays the critical importance that fee land ownership plays in determining the issue of tribal regulatory power. Fee land ownership is more than "one factor a court should consider in applying the *Montana* framework" (App. 16a) and analyzing this Court's prior decisions concerning fee land ownership is more than "a coincidence of facts." (App. 15a.) When applying *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), to this analysis, the 10th Circuit in *Atkinson Trading* errs by relying upon the statement that "the governmental power of a nation is not limited to the occupants of the lands in its country which the nation itself owns, but extends to all the inhabitants of its territory." (App. 15a, *citing Buster*, 135 F. at

952.) This approach fails to acknowledge this Court's decisions that hold that Indian tribes have a unique status as "domestic dependent nations" which lack external sovereignty powers. *See Bourland*, 508 U.S. at 695; *Strate*, 520 U.S. at 445-46; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1,17 (1832).

The facts in *Buster* could not differ more from the fee lands that were transferred in *Atkinson Trading* or other fee lands transferred by the General Allotment Act and its progeny. In *Buster*, the non-members obtained their **deeds from the Creek Nation**. In *Atkinson Trading*, the fee patent issued from the United States of America. Under the General Allotment Act and its progeny, whether tribal lands were ceded to the United States and then sold to non-members, or whether the lands passed from allotment and fee patent to a tribal member and then were sold to non-members, **the fee patent originated from the United States**. Conversely, it is incorrect to say that those fee lands remained within the "territory" and "jurisdiction" of the tribal government that had ceded them to the United States. "[T]reaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Bourland*, 508 U.S. at 697 (*citing Montana*). This Court in *Bourland* noted that a majority of the Court in *Brendale* agreed that fee lands owned by non-members on open portions of the reservation are not subject to tribal zoning. *Bourland*, 508 U.S. at 689,695. This led the Court in *Bourland* to recognize that after *Montana* tribal sovereignty over non-member fee lands is "not inherent and cannot survive without express Congressional delegation." *Bourland*, 508 U.S. at 695, n.15. This analysis is a recognition by this Court of both the historical Congressional policy behind the General Allotment Act that led to fee lands on reservations being owned by non-members, as well as the fact that the Supreme Court's decisions necessarily evolved in light of the impact of changing Congressional policies on fee alienated reservation lands.

The "platonic notions of sovereignty" that guided Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S.(6 Pet.) 515 (1832), have lost their independent sway over time. *See County of Yakima*, 502 U.S. at 257. In 1993 this Court in *Bourland* recognized that *Brendale* stands for the proposition that an abrogated treaty right of unimpeded use and occupation by a band can no longer serve as the basis for the exercise of the lesser included power to regulate. The loss of the power to exclude carries with it the loss of tribal regulatory authority. *See Bourland*, 508 U.S. at 691, n.11. In 1997, this Court held that the "pathmaking case [*Montana*] concerning tribal civil authority over non-members" rests upon principles that support the "general proposition" advanced by *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *Strate*, 520 U.S. at 445. *Oliphant* found that criminal jurisdiction by a tribe over non-Indians under retained tribal sovereignty was "inconsistent with [the tribe's dependent] status." 435 U.S. at 208,212. Put simply, to the extent that *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), much less *Buster*, stood for a different proposition regarding tribal taxation authority over non-member activities on fee lands, evolving Supreme Court opinions have undermined the reasoning that supported those decisions.

Buster is distinguishable because the fee ownership was from a tribal patent, not a United States patent issued pursuant to the General Allotment Act. *Merrion* concerned a severance tax on oil and natural gas removed from **tribal land** and the Jicarilla Apache Tribe Reservation was "held entirely as tribal trust property." "A tribe has no authority over a non-member until the non-member enters tribal lands...." *Merrion*, 455 U.S. at 142. *Compare Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which tribes retain unless divested of it by federal law or necessary

implication of their dependent status." *Id.* at 152. "[T]ribes retain considerable control over non-member conduct on Tribal land." *Strate*, 520 U.S. at 454. Tribal land was described as "land belonging to the tribe or held by the United States in trust . . .." *Id.* at 454, n.8. There is simply no support for the 10th Circuit's decision in *Atkinson Trading* that this Court's decision in *Merrion* must be balanced against the *Montana* test in order to determine whether tribal taxation of non-member activities on fee lands is permissible. *Merrion* concerns taxation of non-member activities on tribal lands and is not inconsistent with *Montana*.

This Court's decisions reflect an evolution necessitated by changes made to the foundation laid by Chief Justice Marshall in his Trilogy.[5] Chief Justice Marshall was attempting to determine the scope of tribal powers and sovereignty in an area in which the Cherokee Nation was a distinct community, occupying its own exclusive territory, and where state laws had no force and the Cherokee had the right to exclude non-members. *See Worcester*, 31 U.S. at 561-63. Conversely, when a tribe loses exclusive control and jurisdiction, based upon fee land transfers to non-members by patents issued by the United States, the tribe also loses regulatory and taxation power over the activities of non-members on fee lands which are or were within the boundaries of a reservation.

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[5] The Marshall Trilogy is comprised of the three landmark opinions of Chief Justice John Marshall, *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

III. FEE LAND OWNERSHIP IS A CRITICAL DISTINCTION BECAUSE OF THE FUNDAMENTAL RELATIONSHIP LAND OWNERSHIP BEARS TO INDIVIDUAL LIBERTIES AND RIGHTS

"[T]he only dependable foundation of personal liberty is the personal economic security of private property.

The teaching of history is very certain on this point. It was in the mediaeval doctrine that to kings belong authority, but to private persons, property, that the way was discovered to limit the authority of the king and to promote the liberties of the subject. Private property was the original source of freedom. It is still its main bulwark. Where men have yielded without serious resistance to the tyranny of new dictators, it is because they have lacked property. They dared not resist because resistance meant destitution. . ..

So we must not expect to find in ordinary men the stuff of martyrs, and we must, therefore, secure their freedom by their normal motives. There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. Men cannot be made free by laws unless they are in fact free because no man can buy and no man can coerce them. That is why the Englishman's belief that his home is his castle and that the king cannot enter it, like the Americans' conviction that he must be able to look any man in the eye and tell him to go to hell, are the very essence of the free man's way of life."

Walter Lippmann, *The Method of Freedom*, pp. 100-102 (1934), *cited in Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171,1175, n.8 (C.A. Fed. 1994).

If private property is the foundation of American freedom, as Lippmann argues, then the relationship between fee land ownership and regulation by a tribal government in which the fee owner cannot participate bears careful scrutiny. Tribal regulation of the activities of United States citizens on their fee owned lands cannot be reconciled with the fundamental rights of that citizen to be regulated only by a government in which the individual can participate by voting and by holding elective office.

The essence of the American representative system of government is that the people of the United States are the sovereign, and this Body Politic has the power to create the constitution that controls the sovereign powers and governmental powers delegated by the people to the federal government. *See* John R. Tucker, *The Constitution of the United States: A Critical Discussion of its Genesis, Development, and Interpretation* (Henry St. George Tucker ed., Fred B. Rothman & Co. 2000) (1899), Volume 1, p.62. The doctrine is stated by Justice Matthews in *Yick Wo v. Hopkins* as follows:

> "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."

118 U.S. 356,370 (1886).

This principle is recognized in the United States Constitution which begins "We the People...." The just powers of government over its citizens are derived only from the consent of the governed, and that consent is conditional on the right of those citizens to participate in that government

through the right of suffrage and by holding elective office. The Declaration of Independence, in paragraph 2, established this "self-evident" truth. This principle was reaffirmed by the United States Constitution and its Tenth Amendment.

These fundamental rights of United States citizens are violated when tribal governments regulate or tax the activities of non-members on their fee lands. The independence of the American Colonies from British control arose directly from their disenchantment with taxation without representation. There was a question whether tribal governments, at least prior to the Indian Civil Rights Act of 1968, 25 U.S.C. §1302 *et seq.*, were limited by the amendments to the United States Constitution in the exercise of their sovereignty powers. *See Talton v. Mayes,* 163 U.S. 376,384 (1896) (holding 5th Amendment inapplicable.) There can be no question that United States citizens are protected by the United States Constitution and its Amendments on their own fee lands. To avoid these issues, the approach this Court has taken is to examine the source and extent of tribal power over non-members on fee lands.

As "domestic dependent nations," tribal governments can exercise only internal sovereignty powers. The people of the United States cannot properly be made subject to inherent tribal regulatory power for their activities on fee owned lands. Put another way, the ultimate sovereign, the people of the United States, cannot be made subject to regulation by tribal governments which do not, and cannot by their nature, provide non-members the fundamental rights guaranteed to the people of the United States by the United States Constitution. *Compare Oliphant*, 435 U.S. at 210. Because the source of tribal authority over non-members is not inherent, *Bourland*, 508 U.S. at 695, n.15, and cannot be inherent because of the dependent status of tribes, tribal governments lack regulatory and taxation powers over the activities of non-members on fee owned lands. Any other conclusion denies non-member landowners "the political

franchise of voting" which is the "fundamental political right . . . preservative of all rights." *Yick Wo,* 118 U.S. at 570. While the federal government's special relationship with the first Americans provides for their right of self-government and limited sovereignty as "domestic dependent nations," tribal powers are internal only unless non-member activity occurs on tribal lands. Unquestionably, non-member fee owned land in which the patent originated from the United States is not tribal land. By protecting the rights of non-members who own fee lands on reservations, this Court affirms and protects the fundamental rights and private property rights of all Americans upon which our freedom depends.

CONCLUSION

For the reasons stated above, this Court must reverse the 10th Circuit's decision in *Atkinson Trading*, and hold that taxation by Indian tribes of non-member activities occurring on fee lands is subject to *Montana's* general rule and is therefore prohibited as inconsistent with the dependent status of the Navajo Nation.

January 12, 2001

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IN THE TRIBAL COURT OF APPEALS
OF THE GRAND PORTAGE BAND OF CHIPPEWA

GRAND PORTAGE INDIAN RESERVATION — **STATE OF MINNESOTA**

Grand Portage Band of Chippewa, Through its Land Use Administrator Lawrence Bushman,	)	
Plaintiff/Appellee,	)	**MEMORANDUM OPINION and ORDER**
vs.	)	
Carroll Melby,	)	App. #99-001
Defendant/Appellant.	)	

Per Curiam (Chief Justice Anderson and Associate Justices Balber and Pommersheim).

I. Introduction

The Grand Portage Reservation was established by the Treaty of 1854.[1] The Reservation was subject to the misguided (allotment) policies of both the General Allotment Act[2] and the Nelson Act.[3] The allotment period was

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[1] 10 Stat. 1109 (1854).

[2] 24 Stat. 388 (1887).

[3] 25 Stat. 642 (1889).

effectively reversed by the Indian Reorganization Act of 1934.[4] The Grand Portage Chippewa voted, along with five other Minnesota Chippewa Bands,[5] in favor of the IRA and in favor of joining together as the Minnesota Chippewa Tribe. As a result, the first contemporary Grand Portage Reservation tribal government was established in 1939 in accordance with a "sub-charter" approved by the Minnesota Chippewa Tribe. The Grand Portage Band, the Plaintiff/Appellee in this proceeding (also referred to herein as the "Band"), is currently governed by the Minnesota Chippewa Tribe Constitution (as amended) which was adopted in 1963.

The Grand Portage Band has worked effectively to reacquire allotted lands within the reservation and to maintain its land base. The Grand Portage Reservation is comprised of approximately 48,000 acres, the vast majority of which is undeveloped. Ninety-five percent (95%) of the Reservation consists of land held in trust by the United States for the Band and its members; three percent (3%) is held in fee by the Band or other governments; and only two percent (2%) is held in fee by non-Indians. Approximately 550 people live on the Reservation, of which two-thirds are Indian.

The land owned by Carroll Melby,[6] the Defendant/Appellant in this proceeding (hereinafter referred to as "Melby"), is part of that two percent of the Reservation held by non-Indians. Except for the portion bordering Lake Superior, this land is completely surrounded by Grand Portage trust land. The land owned by the Appellant was originally part of an allotment made to Joseph Godfrey

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[4] 25 U.S.C. 461-479 (1934).

[5] The other Chippewa Bands include: White Earth, Leech Lake, Fond du Lac, Bois Forte, and Mille Lacs.

[6] More accurately, Carroll Melby is the managing trustee of Herbert Iver Melby Revocable Trust established by his father (now deceased) in 1967. The commercial enterprise located on this land is the Voyageurs Marina.

Montferrand, a Grand Portage Indian, by a trust patent issued on March 1, 1897 under the provisions of the General Allotment Act and the Nelson Act. A fee patent was issued to Montferrand on Sept. 14, 1911. Since this time period is less than the twenty-five year trust period specified in the General Allotment Act, it is presumed that Montferrand's fee patent was issued pursuant to the Burke Act[7] which provided - upon a finding of "competency" - for a fee patent to issue without the allotee's request and before expiration of the normal twenty-five year trust period. Montferrand's allotment was subsequently sold to S. L. Johnson, a non-Indian, in separate transactions in 1921 and 1923. The allotted lands was ultimately sold to Herbert Melby, the Appellant's (non-Indian) father in 1967. On this site, Melby operates Voyageurs Marina which has three hotel rooms, a small store, and dockage to accommodate commercial boat traffic.

The current controversy results from the Melby's decision to erect a metal building for storage and boat repair on his property. In August 1995, Melby obtained a building permit from Cook County. Melby refused to seek a building permit or variance from the Grand Portage Band, and his failure to do so violated the Band's Land Use Ordinance.[8] Melby had received notice from both the Band and Cook County about the existence of the Band's (new) Land Use Ordinance. Despite such knowledge, Melby chose not to seek a permit or variance and erected the building in 1996.

In August 1997, the Band initiated this lawsuit against Melby in the Tribal Court for his failure to comply with the Band's Land Use Ordinance. Melby did not file an answer,

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[7] 34 Stat. 182 (1906).

[8] Grand Portage Band of Chippewa Indians, Ordinance 95-02 (1995). The Cook County setback requirement from Lake Superior is 50 feet, the Band's 100 feet. The building was erected approximately 90 feet from the shoreline and while satisfying the Cook County requirements, the building clearly violated the Band's Land Use Ordinance.

asserted no substantive defenses, but simply moved to dismiss for lack of jurisdiction.

At the same time, Melby filed a lawsuit against the Band and Tribal Court in federal court seeking to enjoin them from exercising any kind of jurisdiction over him. On August 13, 1998, Judge Alsop ruled against Melby[9] and directed him to exhaust his tribal court remedies in accordance with the directives of *National Farmers Union v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

At the Tribal Court level Melby's motion to dismiss the Band's lawsuit was heard before Judge Fineday, Chief Judge of the Grand Portage Tribal Court. After making extensive findings of fact and conclusions of law, Judge Fineday denied both Melby's motion to dismiss and the Band's motion for summary judgment.

Melby filed a proper and timely interlocutory appeal on the issue of jurisdiction and the Band timely cross-appealed the denial of its motion for summary judgment. After extensive briefing by the parties, oral argument in this matter was held before the Tribal Court of Appeals at the Grand Portage Reservation on August 6, 1999.[10]

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[9] *Melby v. Grand Portage Band of Chippewa* (DC, MN, 5th Div.) (1998). Judge Alsop also explicitly ruled that the Grand Portage Reservation was not diminished by the Nelson Act of 1889. In addition, he found no waiver of tribal sovereign immunity, but that a lawsuit seeking prospective injunctive relief against a tribal officer was permitted. He specifically dismissed the action against the Tribe and the Tribal Court.

[10] Just prior to oral argument, Melby filed an Affidavit of Conflict dated August 3, 1999 (just three days prior to oral argument) requesting that each member of the Grand Portage Tribal Court of Appeals recuse themselves because the panel was appointed by Grand Portage Reservation Tribal Council. Dean Deschampe is the Band's Land Use Administrator and a member of the Reservation Tribal Council, and Norman Deschampe is the Chairman of the Grand Portage Reservation Tribal Council. Both are Grand Portage Band members. Under Melby's

II. Issues

This appeal raises two issues, namely:

A. Whether the Tribal Court improperly denied Melby's motion to dismiss for lack of jurisdiction; and
B. Whether the Tribal Court improperly denied the Band's motion for summary judgment.

III. Discussion

A. Jurisdiction

The issue of jurisdiction is a question of law and properly reviewed *de novo*. This is the appropriate general legal standard of federal courts and most tribal courts for review of legal conclusions, and therefore this Court adopts it as the proper standard of review in this matter.[11]

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claim, because each Tribal Court of Appeals member was appointed by the Grand Portage Reservation Tribal Council, the appellate court panel must recuse themselves because of an "employment" relationship with the Grand Portage Tribal Council. In the alternative, Melby seeks to strike the affidavits of Norman Deschampe and Dean Deschampe. Aside from being procedurally defective for not being timely filed under Rule 36(c) of the Grand Portage Rules of Civil Procedure, the Motion fails as being substantively and logically deficient. Neither of the Deschampes are parties to this case in their individual or official capacities, nor as such do they serve as "employers" of the judges on this panel. The grounds presented by Melby would serve to disqualify any tribal court from functioning and, by logical extension, any state or federal court from hearing cases in which a state or federal government interest were at issue.

[11] *See e.g. Filetech S.A. v. France Telecom S.A.*, 147 F.3d 922, 930 (2nd Cir. 1998): "[t]he standard of review established for district court decisions regarding subject matter jurisdiction is clear error for factual findings and *de novo* for legal conclusions." In addition, matters of tribal law are generally not subject to federal review. *Basil Cook Enterprise v. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2nd Cir. 1997). Oddly enough, Melby never addresses the standard of review issue - going so far as to

Analysis of tribal court jurisdiction involves a review of both tribal and federal law. In the instant case, however, there is no dispute as to whether Melby violated tribal law (for he has specifically acknowledged actions in violation of tribal law) and there is no claim that the Band's Land Use Ordinance exceeds the bounds set by tribal constitutional or other positive tribal law.[12] Therefore the sole issue before this Court is to determine whether the Band's Land Use Ordinance and its application to non-Indian land owners is permissible as a matter of federal law.

Neither the U.S. Constitution nor any act of Congress prohibits the application of the Band's Land Use Ordinance to Melby. The dispositive key is rather whether the federal common law principles articulated in *Montana v. United States*, 450 U.S. 544 (1981)[13] and applied in the one tribal

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express no opinion on the matter when queried from the Bench at oral argument - and is therefore deemed to have waived any claims regarding the standard of review.

[12] *See e.g.* Grand Portage Band Judicial Code at Title 1, Ch. II § 1 (1997) which provides:

> The jurisdiction of the Tribal Court shall extend to: . . .
> (b) All actions arising under the Land Use and Zoning Ordinance, and to all persons alleged to have violated provisions of that Ordinance, provided that the action or violation occurs within the boundaries of the Grand Portage Reservation, including all lands, islands, water, roads, and bridges or any interests therein, whether trust or non-trust status and notwithstanding the issuance of any patent or right-of-way, within the boundaries of the Reservation, and adjacent waters of Lake Superior and lands and waters within the area ceded by the Treaty of 1854, and such other lands, islands, waters or any interest therein hereafter added to the Reservation. Hereinafter, reference to "Reservation" shall include all lands and waters described in this paragraph.

[13] Although *Montana* has become increasingly entrenched in Supreme Court Indian law jurisprudence, it is worth recalling how far it departs - without constitutional or congressional authorization - from the previous 150 years of federal Indian law which presumed tribal authority

zoning case decided by the Supreme Court, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 404 (1989), permit tribal jurisdiction in this matter.

Unfortunately, *Brendale* is no beacon of analytical clarity. Its three plurality opinions for two different holdings relative to the 'closed' and 'open' portions of the Yakima Reservation are something of a confused and unresolved muddle. Yet parse it we must. And in so doing, it is not difficult to conclude that the Grand Portage Reservation in its entirety is quite analogous to the 'closed' portion of the Yakima Reservation. In both the 'closed' portion of Yakima Reservation and the entire Grand Portage Reservation, less than two percent of the land is held in fee by non-Indians and the overwhelming amount of land in both cases is undeveloped wilderness. The Grand Portage Reservation is in no way comparable to the 'open' part of Yakima Reservation in which almost half the land is owned in fee by non-Indians and the population is 80% non-Indian (*Brendale* at 492 U.S. 445).

These findings nevertheless have to be refracted through the lens of the *Montana* proviso which provides:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to

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within Indian country unless expressly limited by Congress. *Montana*'s new rule created a presumption against tribal authority on fee land within the reservation, a presumption that may be overcome only by satisfying either of the prongs of the well known *Montana* proviso. This development of a federal judicial plenary power cannot pass without comment. The law is the law but it is not always just or persuasive.

exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[14]

As noted by both Justice Stevens in his fact specific (plurality) opinion and Justice Blackman's more general (plurality) opinion, zoning is necessary to protect the 'welfare of the Tribe' especially in a situation - such as Grand Portage - where the land is overwhelmingly held in trust and where the land is undeveloped. Therefore it is clear to this Court that that portion of the *Brendale* case holding tribal zoning of fee land permissible under the *Montana* proviso relative to maintaining the 'welfare' of the tribe also applies to the case at bar.

It is also instructive to recall some of the particulars of *Montana* that are not present here. *Montana* involved a discriminatory land use regulation that treated non-Indian hunting and fishing on fee land different from tribal members hunting and fishing on tribal trust land. In distinction, the Grand Portage Tribal Land Use Ordinance treats all landholders the same. Melby does not seek equal treatment but rather a 'privileged' status requiring his land to be treated differently from 98% of land on the Reservation. In addition, in *Montana*, the state stocked much of the fish and some of the game on the reservation and arguably had some legitimate interest in these 'resources', while in contrast in the instant case Melby does not (and presumably cannot) demonstrate any equivalent state and/or local interest. These observations are important in order to see - not only from that necessary conceptual view but also from a quite practical view - that the Grand Portage Band is simply seeking to treat everyone the

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[14] *Montana*, 450 U.S. at 565-567.

same in the context of land use and there are no overriding state and/or local interests to the contrary.

Because of the unique facts of this case, this Court must also decide whether the 'consensual' prong of *Montana* proviso is satisfied. None of the opinions in *Brendale* take this tack but it nevertheless seems appropriate in this instance. In both *Montana* and *Brendale*, the tribes sought to regulate what we might call the 'private' use of private land, while in this case the tribe seeks to regulate (in part) the 'public', 'commercial' use of Melby's land. Melby wants to use his land differently to advance commercial and hence public use, rather than strictly private or personal use. This distinction matters. Tribes have long been recognized to have wide authority - both as a result of inherent sovereignty and the right to exclude - to regulate commercial and tax activities within the reservation. See e.g. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), *Williams v. Lee*, 358 U.S. 217 (1959). For example, the Grand Portage Band could clearly require Melby to have a tribal business license and/or reasonably tax his commercial activities. Engaging in commerce on the reservation clearly places that activity, whether by Indians or non-Indians, within the reach of tribal authority. Zoning regulation of commercial entities falls clearly within the sphere of inherent tribal sovereignty and/or the exercise of the right to exclude as an act of sovereignty.

In addition, Melby has participated in commerce with the Band and tribal members. This participation is exhibited by Melby's use of tribal water facilities, and, until recently, Melby's use of tribal waste disposal facilities. Commerce - as opposed to mere private residence - presupposes interaction with the community and its members and the authorization or tolerance by the sovereign to engage in such business. In a word, it is 'consensual' activity. If the Grand Portage Band cannot regulate - by non-discriminatory land use planning - commerce within the reservation, *Montana* will have been extended dangerously beyond its facts and rationale into a

situation where it threatens to swallow tribal sovereignty in its entirety. Surely that was not the intent of *Montana*, and this Court will not engage in such ill considered jurisprudence.[15]

In sum, the Grand Portage Band's non-discriminatory Land Use Ordinance violates neither federal nor tribal law and satisfies both prongs of the *Montana* proviso as being 'consensual' in nature, the violation of which would be a direct threat to the 'health and welfare' of the Band. Therefore, the Band possesses jurisdiction over the zoning controversy between the Band and Melby.

B. Summary Judgment

Having determined that the Band has regulatory jurisdiction, the Court must determine whether the Tribal Court improperly denied the Grand Portage Band's Motion for Summary Judgment.

This Court's jurisdiction to hear this appeal arises under the authority of Title 2, Rule 41(g) of the Grand Portage Judicial Code. This Court's review of Judge Fineday's Order finds that she has provided an excellent summary of the findings of facts and conclusions of law in this case, and the parties' extensive briefs have appropriately established an adequate record for this Court to determine the procedural adequacy and merits of the motion for summary judgment.

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[15] To anticipate a likely query: *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997) does not apply to the case at bar. That case involved a tort action resulting from a car accident involving two non-Indians on a state highway running through the Fort Berthold Reservation in North Dakota. This case is not analogous. This case does not involve a private tort between two non-Indians on a state highway but rather an attempt by the Band to regulate - inter alia - the commercial use of land on the reservation. This dispute involves the tribal sovereign directly; public commerce as opposed to a private tort; and a tiny piece of non-Indian land completely surrounded by trust land (and Lake Superior), not a state highway running through a reservation.

The Band claims that upon the affirmative finding that Melby and his land are subject to the Band's regulatory and adjudicatory jurisdiction, the Band is entitled to summary judgment as a matter of law. That decision rests upon finding in favor of the Band on two issues at dispute by the parties: that the Band's motion for summary judgment was procedurally appropriate, and that the Band is entitled to summary judgment as a matter of law.

With respect to the procedural appropriateness of the Band's motion for summary judgment, Rule 29 of the Grand Portage Rules of Civil Procedure (which resembles Federal Rule 56(a)) reads as follows:

> Any time 20 days after commencement of an action, any party may move the Court for summary judgment as to any or all of the issues presented in the case and such shall be granted by the Court if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Despite Melby's arguments regarding lack of discovery or other claimed procedural defects in this proceeding, Rule 29 permits the filing of a summary judgment motion anytime 20 days after commencement of an action. There is no requirement in the Rule that Melby or any litigant file an Answer to the Complaint before a Motion for Summary Judgment could be made and acted upon by the Tribal Court. The Band's motion was therefore procedurally appropriate.

Upon our finding that the motion for summary judgment was procedurally appropriate, it is not clear that additional discovery would produce any material facts necessary to defeat the Motion for Summary Judgment. The Court must measure the Band's motion for summary judgment, combined with an analysis of Melby's undisputed actions, against the Band's Land Use Ordinance in order to determine whether the Band is entitled to summary judgment as a matter of law.

The Band's adopted Land Use Ordinance requires all land owners to apply for building permits or variances before constructing buildings or other structures within reservation boundaries. Article 12.01 of the Band's Land Use Ordinance requires that an application for a building permit be made to the Band's Land Use Administrator before any building or structure is erected, constructed, reconstructed, altered, moved or enlarged. The findings of Judge Fineday and the record before us clearly document the undisputed fact that Melby violated the terms of the Band's Land Use Ordinance by not obtaining a building permit from the Band, by not obtaining a variance from the Band's set-back requirement as set forth in the Land Use Ordinance, and by proceeding with construction of a storage building in violation of the Band's Land Use Ordinance. Melby does not dispute this. Apparently, it is Melby's belief that had he applied for a permit under the Band's Land Use Ordinance, he would have accepted the jurisdiction of the Grand Portage Band. (Defendant's Reply Brief at 3) We have already shown that the Band's jurisdiction over Melby existed notwithstanding his intentional resistance to comply with the Band's Land Use Ordinance, and Melby has shown that his intentional acts were in clear contravention of the Band's Land Use Ordinance.

Melby appears to claim exemption from the Band's Land use Ordinance by reciting facts that he planned his building, applied for and obtained a Cook County building permit,[16]

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[16] It does not matter that Melby applied for and was granted a building permit from Cook County because the Band's Land Use Ordinance is not limited or affected by Cook County's actions in this matter. Furthermore, the "opinion" of jurisdictional authority provided to Melby by the Cook County Planning Director is not relevant in this case because governing law is federal and tribal law (not state law), and Melby certainly should have been aware that such an opinion would not provide conclusive authority on this issue. This Court is not sympathetic to Melby when he cites his volitional acts contrary to existing regulations as

ordered materials for his building, and paid a nonrefundable deposit before the Band adopted its zoning ordinance. This information merely serves to illustrate Melby's obvious failure to take the necessary steps to comply with the Band's Land Use Ordinance, even after he was aware of adoption of the Ordinance and its possible application to his project. Those facts do not provide a basis for Melby to show that he was not or should not be subject to the Band's Land Use Ordinance, and instead show how he took deliberate steps to avoid the requirements of the ordinance. The information does not defeat the Band's motion that it is entitled to summary judgment as a matter of law.

This Court must address Melby's claim that the mere application of the Land Use Ordinance to his activities is discriminatory in nature (Defendant's Reply Brief at 3). Melby ignores the fact that he has the same rights as any Band member or non-band member in seeking a variance under the Land Use Ordinance. It is difficult to find that the Grand Portage Band discriminated against Melby when Melby did not avail himself to exercise his right to seek a variance under the Band's Land Use Ordinance. Melby's claim of discrimination falls under the weight of the effect of his conscious choice to disregard the Band's Land Use Ordinance in its entirety. The Band's Land Use Ordinance is applicable to all landowners within the reservation boundaries, and was established to be non-discriminatory in its application. Because Melby has chosen to not adhere to its application, he has no basis to claim it is discriminatory in nature. When Melby makes other claims of discrimination or constitutional violations as a result of his lack of voting power or voice in the government establishing the ordinance, his claim of a lack of equal protection is also an untested assumption. Melby may be making an all-too-common

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argument why the Court should not find jurisdiction and should not grant summary judgment in this case.

assumption that permeates the present-day view of many Indian activities such as the exercise of self-government or retained treaty rights: that a different right is a "special", unequal right that by its mere exercise discriminates against those who are not Indian. Melby's assertions in this vein are without merit. This Court finds no "special" or unequal right conferred upon Indians or non-Indians as a result of application of the Band's Land Use Ordinance. Melby cites no authority for his broad claims of discrimination or violation of constitutional rights. The Supreme Court has never upheld such claims and in fact, has often held to the contrary. *See e.g. Williams v. Lee*, 358 U.S. 217, 223 (1959) ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

Melby has also raised the argument that the Band's Motion for Summary Judgment violates Judge Alsop's August 13, 1998 Order referring this dispute to Tribal Court for the exhaustion of jurisdiction. A review of Judge Alsop's Order finds that the Order merely stayed Melby's request for an order enjoining the enforcement of the Band's Land Use Ordinance, pending exhaustion of tribal remedies on the question of the Tribal Court's jurisdiction over Melby's land and actions thereupon. Nothing in Judge Alsop's Order prohibits the Tribal Court from acting upon the summary judgment motion; expeditious resolution of this issue will significantly aid final disposition of this dispute.

By virtue of the fact that Melby did not obtain either a building permit under, or a variance from, the Band's Land Use Ordinance, it is therefore undisputed that as a matter of law Melby violated the Grand Portage Band's Land Use Ordinance. This is the classic situation that calls for summary judgment. There are no issues of material fact. Melby has repeatedly admitted that he did not comply (and does not plan on complying) with the Band's Land Use Ordinance. *See e.g. Bauer v. Albermarle Corp.*, 169 F.3d 962, 968 (5th Cir. 1999)

("This Court recently held that a summary judgment motion can be decided without any discovery"). Combined with the fact that the Band has proper jurisdiction to enforce its Land Use Ordinance in this matter, this Court hereby remands this matter to the Tribal Court for purposes of finding that the Band is entitled to summary judgment in this matter and that judgment should be entered accordingly.

IV. Conclusion

For all the above stated reasons, the Court affirms the trial court's decision recognizing tribal court jurisdiction and reverses its judgment in denying summary judgment in favor of the Band and remands so that judgment be entered accordingly.

IT IS SO ORDERED

Dated: February 15, 2000

Christoper D. Anderson
Chief Justice

Mary Al Balber
Associate Justice

Frank Pommersheim
Associate Justice

JAN 11 2001

No. 00-454

Supreme Court, U.S.
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In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, MEMBERS of the NAVAJO TAX COMMISSION; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE STATES OF SOUTH DAKOTA, ALABAMA, COLORADO, FLORIDA, MICHIGAN, MISSISSIPPI, NORTH DAKOTA, OKLAHOMA AND UTAH IN SUPPORT OF PETITIONER

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INTRODUCTION

The States of South Dakota, Alabama, Colorado, Florida, Michigan, Mississippi, North Dakota, Oklahoma and Utah, through their respective Attorneys General, respectfully submit a brief Amicus Curiae pursuant to S. Ct. R. 37.2 in support of Petitioner.

INTEREST OF AMICI CURIAE

Each State appearing as amicus curiae contains one or more Indian reservations created through operation of federal law. The reservations were originally intended by Congress to be the exclusive territory of tribal members. Congress, however, reversed its course in the General Allotment Act, and in other legislation. As one scholar states, "the United States invited its citizens to homestead Indian land," and "non-Indians accordingly built homes and livelihoods within reservation boundaries." *See generally* Charles F. Wilkinson, *American Indians, Time, and the Law* 23 (1987). The United States, to our knowledge, has never developed precise statistics on land ownership within reservations, but case law makes it clear that it is common for very significant portions of the reservation to be held in fee ownership. *See, e.g., South Dakota v. Bourland*, 508 U.S. 679, 683 (1993) ("[t]oday trust lands comprise less than 50% of the reservation").

The intermingling of fee and trust lands on reservations has created a jurisdictional quagmire. In response, this Court has developed a finely tuned rule applicable to the precise situation at issue in this case: the extent of tribal regulatory authority, exercised through any means,

over non-Indians on fee lands within reservations. In *Montana v. United States*, 450 U.S. 544 (1981), as further explicated in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court set out the "main rule" that the tribes lack jurisdiction over nonmembers on nontribal land within a reservation with two narrow exceptions. The rule gives guidance to the lower courts and, more importantly, to those living in areas integrated by congressional invitation. The rule has created a set of expectations on which tribes and nonmembers, together with the state and federal governments, rely. The decision below undermines this Court's clear precedent and analysis and would insert, in its place, a sliding-scale balancing test to determine tribal authority not only to tax nonmembers on fee lands on the reservation but also, by necessary implication, to regulate other nonmember activities or transactions.

The States share the interest of all those living on reservations for stability and predictability in their daily lives. The States also seek to protect their ability to make arrangements with tribes for the rational integration of state and tribal taxation authority in ways beneficial to both. *See, e.g.*, S.D. Codified Laws Ann. §§ 10-12A-1 *et seq.* (1996) (allowing agreements between the state and tribes to collect tribal taxes); Mont. Code Ann. § 18-11-103(1)(b) (1999) (authorizing public agency to enter into state-tribal agreements).

SUMMARY OF ARGUMENT

1. This Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), and related cases hold that, once a

tribe has lost "gatekeeping" authority with respect to reservation lands by virtue of alienation to a nonmember, it ceases to have the power to regulate nonmembers or their conduct on such lands other than in two exceptional situations. The Tenth Circuit ignored these decisions in concluding that land ownership status was not the controlling consideration in determining the applicable standard for resolving Petitioner's challenge to the Navajo Nation's hotel occupancy tax. In reaching that erroneous conclusion, the Court of Appeals misapprehended the significance of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and 18 U.S.C. § 1151 with respect to presumption against tribal authority arising under *Montana* principles. The result in *Merrion* is grounded in the existence of consent to tribal jurisdiction, one of the exceptions to *Montana*'s "main rule," and in the tribe's retention of "gatekeeping" power, while § 1151 does not constitute a congressional delegation or recognition of substantive tribal authority over nonmembers.

2. Neither exception to *Montana*'s "main rule" applies. The first, or consent, exception rests upon the presence of nonmember consent to extant tribal authority as the quid pro quo for engaging in an activity either directly with the tribe or its members that the tribe may prohibit absent compliance with the particular regulatory measure. No such consent exists here because the Navajo Nation is a stranger to the commercial transaction between Petitioner and its guests. A contrary holding could be based only on the simple act of entering the Navajo Reservation, and that result would swallow *Montana*'s "main rule" into the consent exception and effectively permit *all* forms of tribal regulation.

The second exception, which is predicated on conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe (*Montana*, 450 U.S. at 566), is limited to instances where application of state law to the conduct sought to be regulated by a tribe is preempted. No plausible preemption argument can be advanced in view of this Court's repeated recognition of, most importantly, state taxation power over commercial transactions between nonmembers and tribal businesses under circumstances comparable to those here.

ARGUMENT

I.

THE "MAIN RULE" ESTABLISHED IN *MONTANA* CONTROLS BECAUSE NONMEMBER CONDUCT ON NONTRIBAL LAND IS SOUGHT TO BE SUBJECTED TO THE NAVAJO NATION'S TAX.

The standards governing resolution of Petitioner's challenge to the Navajo Nation's hotel occupancy tax should not have been in dispute below. They were detailed by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and reaffirmed recently in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The Tenth Circuit nevertheless lost its way, misapplying not only what *Strate* characterized as the "main rule" established under *Montana* but also the consent exception to that rule. Because the Court of Appeals has so departed from the "pathmarking" trail left by *Montana*, any analysis must

begin by reviewing that decision's basic contours in the context of tribal tax regulation.

A. Where *Montana*'s Main Rule Applies, a Tribe Presumptively Lacks Inherent Authority to Regulate Nonmember Conduct or Transactions.

1. The issue in *Montana* was whether the Crow Tribe could regulate nonmember hunting and fishing on lands acquired in fee by nonmembers following allotment of the Tribe's reservation. In resolving that issue, this Court employed a two-step approach. It initially examined whether positive federal law conferred regulatory authority on the tribe and then turned to whether the tribe could regulate pursuant to its retained inherent authority. No treaty-grounded delegation of authority was found since, notwithstanding the initial creation of the reservation " 'for the absolute and undisturbed use and occupation of the Indians' " (450 U.S. at 558) (italics removed), Congress's later allotment policy, whose purpose was "the eventual assimilation of the Indian population . . . and the 'gradual extinction of Indian reservations and Indian titles' " could not be reconciled with a determination "that non-Indians purchasing allotted lands would become subject to tribal jurisdiction" (*id.* at 559 n.9). The lower court's reliance on 18 U.S.C. § 1165 also was rejected because "Congress deliberately excluded fee-patented lands from the statute's scope." *Id.* at 561.

With respect to the Tribe's inherent authority, this Court found the presumptive absence of such power because "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe

bears no clear relationship to tribal self-government or internal relations." *Montana*, 450 U.S. at 564. It further extrapolated from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), "the general proposition that the inherent sovereign powers of a tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. However, the Court identified two exceptional situations where the presumption against tribal authority would be rebutted "even on non-Indian fee lands":

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted). The first – or consent – exception was found to be absent because, quite simply, "[n]on-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction." *Id.* at 566. The second exception was deemed inapplicable, since the Tribe and the United States did not allege nonmember hunting and fishing threatened tribal subsistence, trial evidence established that the State traditionally had regulated nonmember hunting and fishing on fee lands, and the state regulatory scheme did not foreclose the Tribe "limiting or forbidding

non-Indian hunting and fishing on lands still owned by or held in trust for the Tribe or its members." *Id.* at 566-67.

2. The *Montana* standards were revisited in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), and *South Dakota v. Bourland*, 508 U.S. 679 (1993). The dispute in *Brendale* involved application of a tribal zoning ordinance to two parcels of nonmember-owned property, one an isolated parcel surrounded by tribal land in a formerly "closed area" of the reservation and the second a parcel situated in an "open area" where substantial nonmember property existed. This Court divided sharply on the validity of the ordinance. Four Justices concluded that, under *Montana*, the tribal regulation could be applied to neither parcel; two Justices held that the regulation could be applied to the parcel in the formerly "closed area" but not in the "open area"; and three Justices stated that the regulation could be applied to both parcels.

The first of these opinions, authored by Justice White, is relevant here, since no question exists as to the "open" nature of Petitioner's property.[1] Justice White

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[1] The "open" rather than "closed" nature of the area in which the parcel was situated assumed importance in *Brendale* because, in the view of Justices Stevens and O'Connor, Congress "could not have intended that tribes would lose control over the character of their reservations upon the sale of a few, relatively small parcels of land." 492 U.S. at 441. Where, however, a tribe "no longer possesse[d] the power to determine the basic character of the area" (*id.* at 446) and thereby "lost any claim to an interest analogous to an equitable servitude" (*id.* at 447), inherent tribal authority over nonmembers was forfeit. The

drew from *Montana* the "general principle," subject to the two exceptions, that the tribe had "no authority to impose its zoning ordinance on the fee lands" at issue. 492 U.S. at 428. "The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Id.* at 430. Justice White additionally found both exceptions inapplicable, the first because neither landowner had a consensual relationship with the tribe; Justice White found that *Montana* had "necessarily decided" that simple status as an on-reservation landowner did not constitute consent. *Id.* at 428. The second exception was inapplicable because, to the extent the tribe might possess a "protectible interest . . . arising under federal law" with respect to the landowners' use of their properties, state and local remedies existed to vindicate it.[2] *Id.* at 431.

Navajo Supreme Court described Petitioner's business as "located on non-Indian fee land and completely surrounded by Navajo Nation trust lands" but also occupied by a facility "cater[ing] to the tourist trade, with a hotel, restaurant, cafeteria, gallery, curio shop, retail store and recreational vehicle park." Pet. 71a-72a. The facility is used primarily by nonmember tourists visiting the nearby Grand Canyon. Pet. 72a. The commercial character of the property's use thus makes any comparison to the property of Philip Brendale – which was an isolated parcel within an otherwise pristine area of tribal lands – inapposite. *See Brendale*, 492 U.S. at 438-440 (Stevens, J.) (describing location of Brendale's property).

[2] Justice Blackmun issued the third opinion in *Brendale*. He contended that the body of the Court's decisional authority supported the proposition "that tribal civil jurisdiction over non-Indians on reservation lands is consistent with the dependent status of the tribes" (492 U.S. at 455) and that *Montana* "should be read[ ] to recognize that tribes may regulate

This Court returned to the issue of inherent tribal civil authority four years later in *Bourland*. The question there was whether a tribe possessed inherent authority to regulate non-Indian hunting and fishing on reservation lands that had been sold to the United States for flood control purposes. Although the treaty creating the reservation had set aside the lands for the involved tribes' " 'absolute and undisturbed use and occupation' " (508 U.S. at 682),

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others.

Id. at 689 (footnote omitted); *see also id.* at 692 ("regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control"). Addressing the assertion that the tribe retained inherent authority to regulate non-Indians in the area, the Court stated that, "[h]aving concluded that Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing, we find no evidence in the relevant

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the on-reservation conduct of non-Indians whenever a significant tribal interest is threatened or directly affected" (*id.* at 456-57).

treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty." *Id.* at 695. It left for determination on remand whether either *Montana* exception applied. *Id.* at 695-96.

3. This Court's decision in *Strate* reaffirmed *Montana*'s status as "the pathmarking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445. "*Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions." *Id.* at 446. This Court additionally removed any dispute over the plenary breadth of the term "tribal civil authority" by emphasizing that, "[w]hile *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of 'inherent sovereignty.' " *Id.* at 453. *Montana* thus governed the determination of the propriety of any manifestation of such authority, including the tribal adjudicatory jurisdiction at issue in *Strate*, since the accident giving rise to the controversy occurred on a state highway as to which the tribes "retained no gatekeeping right" and could not "assert a landowner's right to occupy and exclude." *Id.* at 456. Applicability of *Montana*'s "main rule" (*id.* at 453) meant that, to prevail, the "tribal-court action against nonmembers [must] qualif[y] under one of *Montana*'s two exceptions" (*id.* at 456).

Montana, as made crystal clear in *Strate*, thus establish the core principle that, to the extent the exercise of inherent tribal civil authority is predicated on the right to exclude, that authority is lost as to nonmembers when the conduct sought to be regulated occurs on nontribal lands

except where Congress explicitly directs the contrary. *But see Brendale*, 492 U.S. at 441-42 (Stevens, J.). The rationale underlying the principle is that, upon divestiture of authority to control access to particular land, a tribe necessarily forfeited the lesser "incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Bourland*, 508 U.S. at 689. Because Petitioner's business operations are located on nontribal fee lands within the Navajo Reservation, *Montana*'s main rule applies here, and the Navajo Nation presumptively lacks authority to tax transactions between Petitioner and its guests on those lands.

B. The Tenth Circuit Misconstrued Not Only *Montana* But Also *Merrion* and Improperly Assumed the Existence of Tribal Authority on the Basis of 18 U.S.C. § 1151.

The Court of Appeals reviewed *Montana* and its progeny but concluded that "the analysis set forth in these cases and others can be more accurately explained as instances in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations." Pet. 17a. As a consequence, "the status of the land involved as fee land or tribal land is simply one of the factors a court should consider when determining whether a tax on nonmember activity on the reservation falls within the civil jurisdiction of the tribe." Pet. 19a-20a. The Tenth Circuit's conclusion is remarkable given the clarity with which this Court has spoken concerning *Montana*'s main rule. Two fundamental errors led to the Court of Appeals' patent misreading of controlling doctrinal principles: misapprehension of the reasoning in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and misapprehension of the import of 18 U.S.C. § 1151 where

a tribe attempts to exercise civil authority over nonmember activities on reservation fee lands.

1. The Tenth Circuit concurred in the District Court's opinion that *Merrion* "was not necessarily limited to cases involving tribal lands because the Supreme Court characterized the tribe's authority to tax non-Indians doing business on the reservation as an 'essential attribute of sovereignty' and not merely an extension of a tribe's power to exclude persons from its tribal lands." Pet. 12a; *see also* Pet. 17a ("[e]ven in cases that were resolved favorably for the tribes, the Supreme Court did not indicate that its decision turned on the point of trust land status"). This Court, of course, did hold in *Merrion* that the source of a tribe's inherent power to tax is not merely the power to exclude but emanates additionally from the "tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." 455 U.S. at 137. As this Court explained further:

> [A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.

Id. at 141-42. The issue in *Merrion*, as here, thus was whether the nonmember taxpayers had entered "tribal jurisdiction."

Merrion arose from the imposition of a tribal severance tax on production from reservation trust lands by oil and gas companies pursuant to leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g. This Court held that the lessees entered "tribal jurisdiction" under two theories – the first predicated on the fact that the producers had established a commercial relationship with the tribe and the second on the conclusion that the tribe retained the right to exclude the producers from the affected lands notwithstanding the leases. *See* 455 U.S. at 142 ("a tribe may exercise [the taxing] power over non-Indians who receive privileges from the tribe, such as the right to trade on Indian land"); *id.* at 144-45 ("When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation"). Characterized under *Montana*'s analytical structure, therefore, the Court's reasoning was grounded in the first instance on the consent exception and in the second on the continued existence of a gatekeeping power.[3] *Merrion* is thus fully compatible with *Montana*.

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[3] That the first prong of the Court's reasoning in *Merrion* was premised on consent principles is reflected in the reliance

2. The Court of Appeals construed 18 U.S.C. § 1151 as a congressional "determin[ation] that all lands within the outer bounds of the reservation are within Indian Country and are therefore subject to reasonable tribal authority." Pet. 19a. In reaching this conclusion, the court looked chiefly to *Seymour v. Superintendent*, 368 U.S. 351 (1962), which it construed as holding that "the enactment of § 1151 'squarely put to rest' the issue of whether land owned in fee fell outside tribal jurisdiction." Pet. 18a.

Seymour does not bear the weight placed upon it by the Court of Appeals. It held only that the alienation of land within a reservation to a non-Indian did not remove the property from the reach of § 1151 for purposes of federal law and so preempted state criminal law with respect to an Indian accused of burglary. *Seymour*, 368 U.S. at 357-58. This Court also has employed § 1151 to define the scope of special Indian law preemption principles in a civil context (*see, e.g., Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123-26 (1993); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987)), but *Montana* and its successors establish unequivocally that simple Indian country status does not serve to recognize a tribe's inherent authority over lands owned in fee by nonmembers. *Montana*, 450 U.S. at 559 n.9; *accord, Bourland*, 508 U.S. at 691-92, 695. As *Strate* reiterated, "[s]ubject to controlling provisions in treaties and

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on the three tax decisions identified in *Montana* as exemplifying the consent exception to the main rule. *See Merrion*, 455 U.S. at 137-38 (relying on *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 382 (1980)) & *Merrion*, 455 U.S. at 141-44 (disputing dissent and finding support in *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905)).

statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee land [on reservations] generally 'do[es] not extend to the activities of nonmembers of the tribe.' " *Strate*, 520 U.S. at 453. Indeed, were the Tenth Circuit's conclusion correct with regard to the effect of § 1151, the presumption *against* inherent tribal authority over nonmembers would be transformed into a presumption *of* such authority.[4]

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[4] The Tenth Circuit's failure to distinguish between the role of § 1151 in defining the reach of positive federal law, which was *Seymour*'s focus, and the reach of inherent tribal authority is reflected in its misunderstanding of this Court's rejection of 18 U.S.C. § 1165 as a basis for tribal jurisdiction in *Montana*. *See* Pet. 19a n.10. Section 1165 prohibits unauthorized hunting or fishing on specified lands and was deemed by the *Montana* Court to be unhelpful because the lands covered by the statute are limited to those "owned by Indians, held in trust by the United States for Indians, or reserved for use by Indians." *Montana*, 450 U.S. at 561-62. This Court then observed that, had Congress "wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in § 1165 the definition of "Indian country" in 18 U.S.C. § 1151." *Id.* at 562. Even if one assumes that the Court's reference to "tribal jurisdiction" was intended to hold that § 1165 constitutes an affirmative grant of authority to tribes, such a grant would have been the explicit congressional directive that *Strate* refers to as a "controlling provision[ ]" in a statute that vests in a tribe jurisdiction over a nonmember. *Strate*, 520 U.S. at 453. Thus, the jurisdictional grant with respect to unauthorized hunting and fishing would have arisen from § 1165, not from § 1151 which would have served to define the territorial breadth of the conferred or recognized tribal authority. A comparable oversight makes inapposite the Court of Appeals' heavy reliance on *Buster v. Wright*, *supra*, where the Eighth Circuit effectively held that Congress intended in 1901 legislation to

II.

NEITHER *MONTANA* EXCEPTION APPLIES IN THIS CASE. NONMEMBERS DO NOT CONSENT TO INHERENT TRIBAL TAXATION AUTHORITY MERELY BY ENTERING A RESERVATION, WHILE THE SECOND EXCEPTION HAS NO APPLICATION IN THIS CASE.

A. *Montana*'s Consent Exception Does Not Apply.

Although the Court of Appeals rejected the centrality of land ownership in determining the standards against which the Navajo Nation's exercise of inherent authority is to be assessed, it nonetheless relied on *Montana*'s consent exception for its holding. Pet. 25a, 29a, 32a. The court's conclusion that consent on the part of Petitioner's customers to the hotel occupancy tax exists is, on its face, anomalous in view of the utter absence of any actual commercial relationship between the Tribe and those customers. That facial anomaly is not dispelled by either an analysis of *Montana* and the decisions upon which it relied as exemplifying the consent exception or a review of the Tenth Circuit's tortured construction of the exception.

B. A Straightforward Reading of *Montana* Establishes That the Consent Exception Is Limited to Situations Where a Tribe May Condition Access to a Privilege or Product by a Nonmember Upon Compliance With Tribal Law. The Navajo Nation Lacks That Authority With Respect to Transactions Between Petitioner and Its Nonmember Customers.

Two principles relevant to determining the proper application of the consent exception can be drawn from

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leave unaffected pre-existing tribal authority to impose the challenged privilege tax. *See* pp. 22-24, *infra*.

the earlier discussion of *Montana*. First, no grounds exist to distinguish taxation from other forms of civil regulation when applying the exception. This principle is dictated by the Court's explicit reference to "taxation" as a form of civil regulatory authority in *Montana*, 450 U.S. at 565, and was reinforced subsequently in *Strate*, which made clear that the term "civil authority" includes *all* noncriminal authority exercised pursuant to " 'the inherent sovereign powers of an Indian tribe.' " *Strate*, 520 U.S. at 453. Second, the required consent does not arise from mere presence in Indian country; it instead requires an actual consensual relationship between the tribe and the nonmember pursuant to which the latter consents to some form of tribal regulation as the quid pro quo either for the right to enter into an otherwise consensual relationship with the tribe or its members or for the right of engaging in conduct that the tribe may preclude by virtue of retained gatekeeping authority. This principle flows not only from the literal description of the first exception – which focuses on commercial transactions with the tribe or its members – but also from the fact that the *Montana* Court rejected the notion that Congress intended to delegate or recognize authority over nonmembers simply by virtue of the reservation location of their land holdings. *See Bourland*, 508 U.S. at 695 n.15 ("after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation[ ]' . . . and is therefore *not* inherent") (citation omitted).

Each of these principles is reflected in the four cases relied upon in *Montana* as exemplifying the consent exception. The first, *Williams v. Lee*, 358 U.S. 217 (1959), unlike the remaining three, was not concerned directly

with a tribal authority issue. Rather, it involved the question whether a state court had jurisdiction over a debt collection action brought by a reservation merchant against tribal members. The Court found such jurisdiction preempted and, in that portion of the opinion cited in *Montana*, observed that the merchant "was on the Reservation and the transaction with an Indian took place there" and that prior decisions had "consistently guarded the authority of Indian governments over their reservations." *Williams*, 358 U.S. at 223. Thus, while *Williams'* holding dealt with preemption, its reasoning led ineluctably to the conclusion that, by entering the commercial relationship with the tribal members, the merchant agreed to be bound by tribal law as controlling the resolution of any disputes which could arise from the relationship.

The other decisions cited in *Montana* carried forward this element of a consensual commercial relationship as forming the predicate for tribal regulatory authority. In *Morris v. Hitchcock*, 194 U.S. 384 (1904), this Court rejected a challenge to a Chickasaw Nation privilege tax and to Department of Interior regulations providing for the enforcement of the tax. The tax, adopted in 1902, was imposed on nonmembers who had entered into contracts with tribal members for livestock grazing on allotments. According to the Court, the tax reflected the tribe's power under earlier treaties "to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." *Id.* at 389. While that plenary authority had been limited under the Curtis Act, ch. 517, 30 Stat. 495 (1898), to require the President's approval of certain forms of tribal legislation,

including the challenged tax, the Court construed the statute, "in light of the previous decisions of this court and the dealings between the Chickasaws and the United States," as permitting "the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation as a preventative of arbitrary and injudicious action." *Id.* at 393.

A year later, the Eighth Circuit issued its opinion in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), upholding under comparable circumstances the Department's authority to enforce an occupational fee assessed by the Creek Nation against nonmembers trading within that tribe's territory. It reasoned that the tribe's authority "to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement with the United States" but was an "inherent and essential attribute[ ] of its original sovereignty." *Id.* at 950. That authority additionally remained "intact" except to the extent "destroyed or limited by act of Congress or by the contracts of the Creek tribe itself." *Id.* The court refused to interpret a 1901 statute, ch. 676, 31 Stat. 861, which authorized the purchase of town site lots by nonmembers, as divesting the tribe of the power to impose the tax for several reasons, including the fact that agreement between the United States and the tribe ratified in the statute prohibited taxation with respect to cattle grazing on rented tribal land but "made no provision that noncitizens who engaged in the mercantile business in the Creek Nation should be exempt from [the occupational] taxes." *Id.* at 954. Since the occupational

fee's enactment predated the agreement and, indeed, had been approved specifically by Attorney General Griggs in 23 Op. Att'y Gen. 214 (1900), "the conclusive presumption is that . . . the power of the Creek Nation to exact these taxes, and the authority of the Secretary of the Interior and his subordinates to collect them, were neither renounced, revoked, nor restricted." *Id.*

The last case, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), upheld tribal sales taxes imposed on nonmember purchasers of cigarettes owned by several tribes and sold through reservation outlets whose operators were required to pass the tax through to the ultimate consumer. This Court reasoned that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 152. It found no congressional abrogation of that authority and "no overriding federal interest that would necessarily be frustrated by tribal taxation" in the context at hand. *Id.* at 154. *Colville* thus presented a situation where nonmembers consented to the taxation by engaging in a commercial transaction with an agent of the tribe.

In sum, *Morris*, *Buster*, and *Colville* embodied straightforward quid pro quo relationships where a tribe possessed the authority to control access to a particular privilege or product by demanding compliance with a tax; i.e., the tribes had the right to preclude horse- or cattle-grazing, trading, or purchasing cigarettes without the tax being first paid by federal agency enforcement or simply refusing to sell the good. Here, however, the

Navajo Nation may not control nonmember access to or patronage of Petitioner's place of business because the tribe possesses "no gatekeeping right" in that respect. *Strate*, 520 U.S. at 456. Respondents instead seek to tax a transaction between nonmembers to which the tribe is a stranger commercially and, for *Montana* purposes, legally. Expanding the consent exception beyond the narrow circumstances reflected in the exception's common law sources to this situation "would severely shrink" (*Strate*, 520 U.S. at 458), if not entirely eviscerate, the presumption against the existence of tribal civil authority because consent would arise merely through presence on the reservation. It accordingly comes as no surprise that the Court of Appeals' reasoning accomplishes just such a result.

C. The Tenth Circuit's Construction of *Montana*'s First Exception Adopts a Standardless Consent Test That, as a Practical Matter, Authorizes All Forms of Tribal Regulation Over Nonmembers.

As discussed in Part I, the Tenth Circuit's understanding of *Montana*'s "main rule" departed dramatically from this Court's analysis in *Strate*. The Court of Appeals nevertheless continued on to adopt and eventually reapply the District Court's three-part test for determining whether consent to tribal jurisdiction existed: "(1) [whether] the hotel guests staying at [Petitioner's] hotel had entered into a consensual relationship with the tribe; (2) [whether] the relationship entered into was relevantly related to the tax in question; and (3) [whether] the tax was . . . a disproportionate burden on [Petitioner's]

guests." Pet. 9a.[5] None of these factors, except the first, is discernable from the decisions relied upon by this Court in *Montana* as exemplifying the consent exception, while the test's actual application virtually assures that consent to tribal authority will be found.

The Tenth Circuit's reconfiguration of the consent exception was drawn principally from the *Montana* Court's reliance on *Buster* as one example of the consent exception. *See* Pet. 14a (describing *Buster* as "what may be the most significant case illustrating the consensual relationship exception as it relates to tribal taxation of non-Indians on fee land"). The Court of Appeals reasoned that

> [t]he consensual relationship holding in *Buster* involved merchants and traders who were deemed liable to pay taxes for exercising a taxable privilege – that of conducting business

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[5] The Court of Appeals also approved the trial court's description of its test as " 'a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction.' " Pet. 13a-14a. It later characterized the standard as a two-pronged analysis:

> The primary considerations that the Supreme Court has taken into account in cases involving tribal jurisdiction and nonmembers on the reservation are (1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting to exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved.

Pet. 25a. The court apparently saw no substantive difference among these several formulations, since it affirmed the District Court by reviewing the record against the three factors described in the text. Pet. 25a-26a.

> within the boundaries of the Creek Nation. . . . The relationship was consensual because the nonmember business owners could "refrain from the [privilege] and . . . [therefore] remain[ ] free from liability for the [tax]."

Id. Although Judge Sanborn, in writing for the Eighth Circuit panel, did begin the court's opinion with the quoted excerpt to suggest that the exaction "partakes far more of the nature of a license than of an ordinary tax[ ] because it has the optional feature of the former and lacks the compulsory attribute of the latter" (*Buster*, 135 F. at 949), it was not merchants' consent that gave rise to the Creek Nation's authority to preclude trading without the tax's payment.

The merchants instead voluntarily determined to expose themselves to the tribe's *preexisting* jurisdiction to impose the tax which arose by virtue of retained inherent authority over all lands within the Creek territory. *Id.* at 950-51, 952-53. Not only had that authority been left largely unaffected by the Curtis Act and the 1901 statute incorporating the Federal Government's agreement with the tribe (*id.* at 953-54), but the Creek legislature's license tax also was characterized by Judge Sanborn as "in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation" (*id.* at 956). In sum, when the analysis in *Buster* is extrapolated more broadly, it stands for the fundamental proposition that nonmembers cannot create tribal inherent authority or jurisdiction but that they can determine to enter into a relationship with a tribe or to engage in conduct that brings them within the scope of

otherwise extant tribal power.[6] *See also Merrion*, 455 U.S. at 142 ("the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction").

The critically distinguishing aspect of *Buster* for present purposes lies in the fact that here, unlike the tribe there, the Navajo Nation lacked the preexisting jurisdiction to which Petitioner's guests could be deemed to consent. Contrary to the Tenth Circuit's conclusion below and as explained *supra* at pp. 14-15, Congress's definition of Indian country in 18 U.S.C. § 1151 did not constitute a determination "that all lands within the outer boundaries of the reservation are . . . subject to reasonable tribal

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[6] *Buster*, it should be noted, does *not* claim to set out a general rule that alienation of land does not forfeit the jurisdiction of the tribe. *Buster* plainly recognized that the alienation of land *does* generally divest the tribe of any preexisting jurisdiction when it recognized the "general rule of law announced in *Bates v. Clark*, 95 U.S. 204, 205, 208, 24 L.Ed. 471 (1877), that all the original Indian country remains such until the Indian title to it is extinguished, and no longer, 'unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.' " *Buster*, 135 F. at 952. This "general rule," *Buster*, 135 F. at 958, provides in effect that loss of the original Indian title does in fact extinguish the authority of the tribe because, in the understanding of the time, loss of tribal ownership terminated reservation status. *See Solem v. Bartlett*, 465 U.S. 463, 468 (1984). *Buster* did not apply this "general rule" but found that the peculiar situation before the Court fell under an "express *exception* to the rule," 135 F. at 952 (emphasis added), relating to the fact that the Creeks held their territory under a patent from the United States and under an act of Congress which expressly provided that it should be the country of the Creeks so long as they existed as a nation and continued to occupy the territory.

authority." Pet. 19a. A necessary predicate for application of the consent exception is consequently absent. The Court of Appeals' three-part "balancing test," in other words, is concerned not with what should be the threshold question of whether the tribe has inherent authority to regulate the matter at hand but rather with whether the exercise of such authority is "reasonable" under the particular facts. Again, however, the question of consent becomes material only when tribal civil authority over the involved land or transaction has been established under governing principles. *Montana* unequivocally compels a conclusion that such authority is lacking over the Petitioner and its guests since, unlike the situation in *Buster*, no statute or treaty rebuts the "main rule" foreclosing the exercise of tribal authority over nonmembers with respect to nontribal land transactions.

There are nevertheless two points that must be made about the Tenth Circuit's "balancing test." First, the practical effect of the balancing test, when coupled with the lower court's expansive understanding of tribal jurisdiction pursuant to § 1151, is to authorize application of tribal taxes without reference to land ownership considerations. Nonmembers will be deemed to have entered into the requisite "consensual" relationship with the tribe by virtue of their simple presence on the reservation; the "relevantly related" factor will be satisfied in most, if not all, instances by establishing a nexus between the tax and the conduct constituting the consensual relationship; and the "disproportionality" consideration rarely, if ever, will be disqualifying.

Thus, for example, in finding the Navajo tax not "disproportionate," the Tenth Circuit relied on decisions

measuring the validity of local taxes on hotel or motel room occupancy under the Due Process and Equal Protection Clauses. Pet. App. 30a. This Court, however, has rejected the contention that the Due Process Clause requires "the amount of general revenue taxes collected from a particular activity [to] be reasonably related to the value of the services provided to the activity." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 (1981).

The Court additionally has stressed that the "latitude afforded the States under the Due Process Clause" is no less than that afforded them under the Commerce Clause (*id.* at 623) which requires only that "the measure of the tax must be reasonably related to the extent of the contact" *Id.* at 626 (emphasis omitted); *see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (state tax is permissible under the Commerce Clause if it "is applied to an activity with a substantial nexus to the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State"). It would be a highly unusual tribal tax that could not meet the elastic standards implicitly proposed by the Court of Appeals.

Second, although this case has arisen in connection with a tribal tax, the Tenth Circuit's analytic prescription extends to determining the validity of *all* attempts by tribes to exercise civil authority over nonmembers. It is therefore instructive to compare how *Montana* itself would have been analyzed under the Court of Appeals' approach to that actually used by this Court. The first element of the "balancing test" would have been met because the nonmember hunters and fishers had entered the Crow Reservation voluntarily. The second element

would have been met because the tribal regulation was "relevantly related" to the nonmembers' conduct on the affected fee lands. Resolution of the third element would have been more troublesome because the involved tribal ordinance prohibited any reservation hunting and fishing by nonmembers. *Montana*, 450 U.S. at 548-49. Resolving whether a blanket prohibition was "disproportionate" presumably would have demanded close examination of why complete cessation of nonmember hunting and fishing was appropriate and balancing tribal and nonmember interests with reference to achieving the interests that underlay the ordinance. In fact, though, this Court summarily dismissed the first exception's applicability with the statement that nonmember hunters and fishers had not entered into any agreements "so as to subject themselves to tribal civil jurisdiction." *Id.* at 566; *see also Strate*, 520 U.S. at 457 (no consensual relationship for first exception purposes where, despite fact that respondent was on reservation performing a subcontract for the tribe, accident was with a person not associated with the contract and the tribes were otherwise " 'strangers to the accident' "); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. at 428 (plurality op.) (petitioners "do not have a 'consensual relationship' with the Yakima Nation simply by virtue of their status as landowners within reservation boundaries, as *Montana* itself necessarily decided").

It is plain that, in determining whether a consensual relationship exists, the Court has looked to see if there were actual, not implied, commercial or other direct dealings between the nonmember and the tribe or its members to which the affected regulation was directed. The

Tenth Circuit's approach cannot be squared with this Court's and would have the probable effect of expanding the consent exception to a broad array of tribal regulatory measures where the sole contact between the nonmember and the tribe is the former's presence within the reservation.

D. *Montana*'s Second Exception Is Inapplicable Because State Law Is Not Preempted From Application to the Commercial Relationship Between Petitioner and Its Guests.

The Navajo Supreme Court, in addition to finding consent to tribal jurisdiction, found that tribal jurisdiction also existed under the second *Montana* exception. *See* Pet. 88a-89a. Neither the District Court (Pet. 65a n.28) nor the Court of Appeals (Pet. 11a n.8) ruled on the applicability of the second exception. Nonetheless, because the ultimate determination of this cause will require consideration of both prongs of the *Montana* test, the Amici States suggest that it is appropriate to consider the scope of that exception.

The *Montana* second exception is limited to those situations in which application of tribal law "is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.' " *Strate*, 520 U.S. at 459 (quoting *Williams*, 358 U.S. at 220). The *Williams* standard describes a federal common law rule of preemption, as do the remaining three decisions cited in support of the exception. *See Fisher v. District Court*, 424 U.S. 382 (1976) (state court jurisdiction preempted with respect to adoption proceeding that involved tribal members residing on

reservation); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906) (state tax imposed on nonmember-owned cattle grazing on reservation lands); *Thomas v. Gay*, 169 U.S. 264 (1898) (same). It is unsurprising that *Strate* emphasized that the question raised by the second exception is whether the "State's . . . exercise of authority would trench unduly on tribal self-government." *Strate*, 520 U.S. at 458. When that question is answered affirmatively, state authority to regulate the involved conduct is preempted and tribal law is appropriately given effect. The exception is thus quite narrow since, as *Strate* pointedly observed, a broader application "would severely shrink the [main] rule."[7] *Id.*

Here, there is no room for dispute over whether state law generally, and state tax law specifically, can be applied to the commercial relationship between Petitioner and his guests. This Court in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992), held that its "more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." Several years earlier, the Court had upheld imposition of a state oil and gas severance on reservation trust land production by a corporation pursuant to lease entered into with a tribe pursuant to the Indian Mineral

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[7] Given the divided opinions in *Brendale*, it is unresolved whether the second exception can be used offensively – i.e., to subject an unconsenting nonmember to tribal jurisdiction – or only defensively – i.e., to prevent state law from being applied. This issue need not be decided here, since the exception is inapplicable.

Leasing Act. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). *Cf. Montana v. Crow Tribe*, 523 U.S. 696, 717 (1998) (under *Cotton Petroleum*, state tax preempted only to the extent "extraordinarily high"). It routinely has rejected preemption challenges to sales or related taxes imposed on nonmembers doing business with *tribal* retailers. *See, e.g., Department of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *California State Bd. of Equal. v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (per curiam); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). Needless to say, the two tax decisions cited in connection with the second exception – *Montana Catholic Missions* and *Thomas* – further argue unmistakably against the second exception's applicability.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, MENOMINEE INDIAN TRIBE OF WISCONSIN, PUEBLO OF POJOAQUE, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, MANZANITA BAND OF MISSION INDIANS, AND SEMINOLE TRIBE OF FLORIDA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indian tribe has sovereign authority to impose a tax on nonmember activities and transactions taking place on fee lands within the borders of the tribe's reservation where the tax does not regulate the nonmember's conduct but is imposed to raise revenue to support tribal governmental services.

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INTEREST OF AMICI CURIAE

The Confederated Tribes of the Umatilla Indian Reservation (Umatilla Tribes) are federally recognized Indian tribes.[1] The Umatilla Reservation, some 172,000 acres, is located in Oregon. Approximately two-thirds of the Umatilla Tribes' 2,262 members live on or near the Reservation, along with approximately 1,000 members of other tribes and 1,700 non-Indians. The Taxation Code of the Umatilla Tribes includes a "Transient Lodging Tax" similar to the Navajo Nation's Hotel Occupancy Tax, which is at issue before the Court. In addition, the Taxation Code includes a "Utility Tax" that applies to non-Indian businesses operating within the exterior boundaries of the Umatilla Reservation. The revenue raised through these taxes supports essential government services provided by the Umatilla Tribes, including police and fire protection and emergency response services.

Amicus Three Affiliated Tribes of the Fort Berthold Reservation (Three Affiliated Tribes) are federally-recognized Indian tribes residing on the Fort Berthold Indian Reservation in North Dakota. The Fort Berthold Reservation contains land held in trust for the Three Affiliated Tribes and their members, as well as lands owned in fee by non-members. *See New Town v. United States*, 454 F.2d 121, 127 (8th Cir. 1972). Through its Tribal Tax Code, the Three Affiliated Tribes imposes a "possessory interest tax" on certain real and personal property within the Reservation, and

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and a joint letter evidencing their consent is on file with the Office of the Clerk of this Court.

an oil and gas gross production tax.[2] These taxes are imposed to raise revenue for the promotion of the health, security, economic and general welfare of both members and non-members residing or doing business on the Reservation, for government operations, for the delivery of services on the Reservation, and for the development of the Reservation economy.

Amicus Menominee Indian Tribe of Wisconsin (Menominee Tribe) is a federally recognized tribe located in northeastern Wisconsin. The Menominee Tribe's reservation, established on May 12, 1854 in the Treaty of 1854, 10 Stat. 1064, and recognized by statute, 25 U.S.C. § 903d(b), comprises some 325,000 acres of land. Approximately 10-15% of that land consists of fee land held by non-Indians. The Menominee Tribe imposes a "hotel room tax" like the Navajo Hotel Occupancy Tax at issue in this case, and a use tax on construction materials brought onto the reservation. Revenues generated by these taxes are used to support tribal programs and services.

Amicus Pueblo of Pojoaque (Pueblo) is a federally-recognized Indian tribe residing on its Pueblo in New Mexico. Like other pueblos in New Mexico, the Pueblo derives its title from Spanish grants, and holds its lands in fee simple. The Pueblo's lands are therefore not a "reservation," though they do constitute "Indian country" over which the Pueblo has jurisdiction. *See United States v. Sandoval*, 231 U.S. 28 (1913); 18 U.S.C. § 1151(b). There are some 13,500 acres within the exterior boundaries of the Pueblo. Of these, approximately 2,800 acres are held in fee by nonmembers; the remainder is held in fee simple by the Pueblo, subject to a restraint on alienation imposed by 25 U.S.C. § 177. In addition, the Pueblo is the beneficial owner of two parcels

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[2] Portions of the Three Affiliated Tribes' Tax Code are included in the record at 138a.

totaling some 237 acres that are held in trust by the United States for the Pueblo. The Pueblo imposes several taxes, including a "lodgers tax" like the hotel occupancy tax at issue in this case, a gross receipts tax, an *ad valorem* tax on the property of utility companies (including rights-of-way over the Pueblo's lands), and cigarette and gasoline taxes. Receipts from the taxes collected are paid into the Pueblo's general fund, and are used for the provision of tribal services and programs.

Amicus Salt River Pima-Maricopa Indian Community ("SRPMIC" or "Community") is a federally-recognized Indian tribe residing on a reservation in Arizona. Of the approximately 52,000 acres that comprise the Reservation, a small portion is owned in fee by members and non-members. About one-half of this fee land is situated along a commercial corridor. There is significant commercial development within the Community that may be owned and managed by the Community itself, a Community member or a fee land owner. There are also non-member lessees of tribally or individually owned trust lands. Commercial development is expected to grow considerably in the future.

The SRPMIC imposes various taxes such as possessory interest, business privilege (sales), tobacco and utility taxes on commercial businesses to raise revenues to support essential services provided by the Community. These services include but are not limited to police and fire protection, emergency response services, public health inspections building code enforcement, health and safety enforcement, and public transportation. These services are provided to member and non-members alike, and to business and residences. The State and local governments provide next to no governmental services within the boundaries of the Salt River Pima-Maricopa Indian Community Reservation. If the gas station on fee land is robbed, if there is a fire at the convenience store on leased Community-owned trust land, or

if someone has a heart attack at a restaurant at the Pavilions shopping center on leased member-owned trust land, it is the Community that will provide assistance through its governmental services. Additionally, in order to support further economic development, the Community needs revenue sources to help fund the construction of infrastructure such as water, sewers and roads. For the above-described and other governmental purposes, all of which respond to the health, safety and welfare needs of individuals regardless of whether they are members or non-members, the Community must continue to raise revenues through taxes.

Amicus Seminole Tribe of Florida (Seminole Tribe) is a federally recognized tribe with approximately 85,285 acres of trust land existing within six counties in Florida, including the following reservations: the Hollywood Reservation in Broward County (497 acres); the Big Cypress Reservation in Hendry and Broward Counties (52,338 acres); the Brighton Reservation in Glades County (35,805 acres); the Immokalee Reservation in Collier County (600 acres); and the Tampa Reservation in Hillsborough County (39 acres). The Seminole Tribe does not have any fee land within these reservations, but does have land outside of the reservations over which it exercises tribal authority. The Seminole Tribe imposes a tax on cigarettes sold at retail outlets on tribal lands. Revenues from the taxes collected are used for tribal services.

Amicus Manzanita Band of Mission Indians (Manzanita Band) is a federally recognized tribe located in San Diego County in the western Carrizo Desert in Southern California. The Manzanita Band's reservation, established by the Act of January 11, 1891, 26 Stat. 712-714, encompasses some 3,600 acres, of which 140 acres are held in fee by non-Indians. Though the Manzanita Band has not yet imposed any taxation on the fee lands or activities taking place on such lands within its borders, it reserves its power to tax or regulate on such lands.

The Court's decision in this case could have a significant impact on the current tax systems of *amici* tribes, and could jeopardize an important source of tribal revenue for those tribes. Loss of such revenues would lead to a decrease in services provided by the tribes. In addition, all of the *amici* tribes—including those that do not now tax the activities of non-members on non-members' fee lands—have an interest in maintaining their powers to tax such activities in the future in order to raise revenues for tribal services, and in the broadest interpretation of tribal powers over non-Indians and limited exclusions from those powers.

SUMMARY OF ARGUMENT

Tribal authority to tax non-Indians has long been recognized by the United States Supreme Court. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court upheld the Jicarilla Apache Tribe's right to impose a severance tax on non-Indian oil and gas production. The taxable activity took place on trust land but pursuant to leases that granted the lessees the exclusive and perpetual right to extract oil and gas from the property. The lessees argued that the tribe had ceded its power to exclude them from the property when it entered into the leases and that it therefore lacked the power to impose the tax. The Court rejected the assertion that a tribe's authority to tax non-Indians who do business on the reservation stems exclusively from its power to exclude. Instead, the Court held that the Tribe's authority to tax derives from its power to govern and to pay for the costs of self-government. *Id.* at 143–44. The Court cited several landmark non-Indian tax cases that outline the "general principles of taxation" under which governmental entities, like tribes, may exercise their power to tax. *Id.* at 137–38, 140.

Montana v. United States, 450 U.S. 544 (1981), decided less than a year before *Merrion*, and the case relied on by the Tenth Circuit Court of Appeals and the Petitioner in this case,

dealt with the validity of legislation enacted by the Crow Tribe preventing non-members from hunting and fishing on its reservation, including that part of the reservation owned in fee simple by non-members. The Court found that the Tribe had lost the right to absolute use and occupation of lands that had been conveyed in fee to non-members and therefore as a general rule no longer possessed the incidental power to *regulate* the use of the lands by non-Indians. The Court acknowledged, however, that "Indian tribes retain sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. In particular, the Court noted that a tribe "may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members" and may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66.

Montana is not a tax case; it is a case delineating regulatory authority. The context of the Court's reference to taxation in *Montana* is in connection with a tribe's attempt to "regulate . . . the activities of nonmembers . . . ." *Id.* at 565. Taxation can indeed be regulatory in nature. However, in its more common form, it is simply a means of raising revenue to pay for the cost of government and is not intended to circumscribe the activities or conduct of taxpayers. The Court has long recognized the distinction between *regulatory* taxation and *revenue-raising* taxation, each of which is subject to different standards and analysis. It made just such a distinction in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), which involved tribal taxation and was handed down only ten months prior to *Montana*. The Court recently reaffirmed this distinction in a non-tribal context in *Jefferson County v. Acker*, 527 U.S. 423 (1999). This distinction is a critical one.

Unlike tribal *regulatory* power, which is derived in large part from the power to exclude non-Indians from the reservation, a tribe's revenue raising power of taxation is derived from its sovereign power to govern and the concomitant authority to raise revenues to pay for the costs of government. In sum, the power of a tribe to tax non-Indian activity is analyzed under *Merrion*, not *Montana*, and the exercise of that power is not dependent on whether the activity occurs on trust land, fee land, or fee-equivalent land.

The Tenth Circuit reached the correct result but employed the wrong analysis. The court should have upheld the application of the Navajo Tribe's Hotel Occupancy Tax, 24 Navajo Tribal Code §§ 101-142, to hotel guests on fee lands within the reservation boundaries under *Merrion*. There was no need to determine whether the hotel guests had entered into "consensual relations" with the Navajo Tribe sufficient to uphold tribal regulation under *Montana*. To the extent that the *Montana* analysis applies to taxes at all, it is limited in application to *regulatory* taxation. *Montana* has no applicability to the Navajo Hotel Occupancy Tax, which has only a revenue raising purpose. This court should affirm the judgment of the lower courts, but should do so on the basis that the Navajo Tribe has the power under *Merrion* to tax hotel guests on fee lands to raise revenues for tribal services.

ARGUMENT

I. *MERRION* PROVIDES THE ANALYTIC FRAMEWORK FOR DETERMINING THE VALIDITY OF NON-REGULATORY TRIBAL TAXATION OF NON-MEMBERS

A. A Tribe's Power To Tax Derives From Its Power To Govern And Raise Revenues—Not From Its Power To Exclude

In *Merrion v. Jicarilla Apache Tribe*, the Court upheld the Jicarilla Apache's right to impose a severance tax on non-Indian oil and gas production on the reservation. 455 U.S.

130 (1982). The activity on which the tax was levied took place on trust land, but pursuant to leases giving the lessees exclusive right to extract oil and gas on the property for so long as they continued to conduct that activity. The lessees argued that while the activity took place on trust land, the tribe lacked authority to impose the tax because it had ceded its power to exclude them when it entered into the leases. The Court rejected the assertion that an Indian tribe's authority to tax non-Indians who do business on the reservation stems exclusively from its power to exclude such persons from tribal land:

> We disagree with the premise that the power to tax derives only from the power to exclude . . . . The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands.

Id. at 137.

The Court rejected the notion that earlier decisions upholding tribal power to tax non-members limited the exercise of that power to a tribe's power to exclude:

> [T]he decision in *Buster v. Wright* [3] actually undermines the theory that the tribes' taxing authority derives

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[3] *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). In *Buster*, the Court of Appeals focused on tribal sovereign authority as the source of the Creek Nation's powers of taxation within its borders regardless of the underlying form of land ownership. *Id.* at 951-52. The right to exclude was irrelevant to the holding in *Buster* because the Creek Nation had lost the ability to require the non-member taxpayers to leave the reservation if they failed to pay the taxes. *See id.* at 954. This Court has cited *Buster* to illustrate that a tribe may legitimately exercise its inherent sovereign authority to tax non-members even on non-Indian fee land within the reservation. *Merrion*, 455 U.S. at 143-44; *Washington v. Confederated Tribes of the Colville Indian Reservation*,

> solely from the power to exclude non-Indians from tribal lands . . . . Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the court held that the Tribe retained its power to tax. The court concluded that "[neither] the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners*." This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.

Id. at 143-44 (quoting *Buster*, 135 F. at 952).

The *Merrion* Court continued:

> We choose not to embrace a new *restriction* on the extent of the tribal authority to tax . . . . Instead, based on the views of each of the federal branches, *general principles of taxation*, and the conception of Indian tribes as domestic, dependent nations, we conclude that the Tribe has the authority to impose a severance tax on the mining activities of petitioners as part of its power to govern and to pay for the costs of self-government.

Id. at 144 (emphasis added).

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447 U.S. 134, 153 (1980). *See also Montana*, 450 U.S. at 566; *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997). Furthermore, *Buster* cannot be legitimately distinguished from *Atkinson* on a factual basis as Petitioner has argued at page 29 of its brief. *See* Pet. App. 20a-24a (noting that the relevant factual connection between *Buster* and *Atkinson* is the non-member being situated on fee land within the boundaries of a tribe's reservation and finding other factual distinctions irrelevant); *Buster*, 135 F. at 950 (stating that tribal powers to tax do not emanate from a treaty or federal statute, but stem from inherent sovereign authority).

Thus, either a tribe's power to exclude or its status as a sovereign government is alone sufficient to allow taxation within Indian country. The *Merrion* Court relied on and approved of a long and enduring lineage of judicial precedent and other authorities (pre-dating *Montana v. United States*, 450 U.S. 544 (1981)) upholding broad powers of tribal taxation intended to raise revenue to fund government services.[4]

Just three years after it decided *Merrion*, this Court reiterated that tribes could tax non-Indians in order to raise revenues for tribal programs: "The power to tax members and non-Indians alike is surely an essential attribute of [tribal] self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985).

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[4] *See, e.g., Merrion*, 455 U.S. at 137 (citing *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824) for support that a tribe has sovereign authority to "control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction."); *id.* at 139 (citing a Department of the Interior Solicitor's Opinion, Powers of Indian Tribes, 55 I.D. 14, 46 (1934) (from *Colville*, 447 U.S. at 153) for its recognition that a tribe's sovereign power to tax "may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions."); *id.* (citing 23 Op. Atty. Gen. 214 (1900); 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855) (from *Colville*, 447 U.S. at 152-53), for the Attorney General's repeated recognition of broad tribal authority, including taxation, over activities of non-Indians within a reservation); *id.* at 139-40 (quoting S. Rep. No. 698, 45th Cong., 3d Sess., 1-2 (1879) to demonstrate congressional acknowledgement of the validity of a tribal tax imposed on non-members by a tribe within its territory); *id.* at 141-42 (discussing *Morris v. Hitchcock*, 194 U.S. 384 (1904) to demonstrate approval of a revenue raising tax imposed on non-Indians); and *id.* at 141, 143-44 (discussing *Buster*, 135 F. 947, as confirmation that a tribe's authority to tax derives from its power to "raise revenues and pay for the costs of government.").

B. Under *Merrion*, A Tribe May Exercise Its Power To Tax In Accordance With General Principles Of Taxation Applicable To Other Government Entities

The *Merrion* Court relied on several landmark non-Indian tax cases to outline the circumstances under which a tribe's power to tax can be exercised:

> The petitioners avail themselves of the "substantial privilege of carrying on business" on the reservation. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 437 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-45 (1940). They benefit from the provision of police protection and other governmental services, as well as from "the advantages of a civilized society" that are assured by the existence of tribal government. *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980) (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government.

Merrion, 455 U.S. at 137–38.

None of the cases cited by the Court were concerned with whether the taxing jurisdiction had exclusive or unrestricted regulatory power within its jurisdiction, or with whether the taxing jurisdiction retained any ownership interest in the property on which the taxable transaction occurred. Rather, these cases are representative of a body of jurisprudence establishing the "general principles of taxation" to which the Court referred in upholding a broad tribal right to tax. *Id.* at 140. These principles support the right of a tribal governmental body to tax activity or property within its

jurisdictional boundaries to fund the costs of its governmental programs.[5]

The Court in *Merrion* chose to apply the now routine nexus analysis contained in *Mobil Oil Corp. v. Commissioner of Texas,* 445 U.S. 425 (1980), and *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), in establishing the Tribe's right to tax: the taxpayer had nexus because it conducted business activity on the reservation. *Merrion,* 455 U.S. at 137. Similarly, the Court cited the observation in *Exxon Corp. v. Wisconsin Dept. of Revenue*, 477 U.S. 207, 228 (1980), another state nexus case, that the establishment of nexus entitles a jurisdiction to tax in order to raise the revenue to provide the "advantages of a civilized society" to the benefit of all who maintain situs or transact business within the jurisdiction.

The Court found the tribal tax in *Merrion* to be consistent with general principles of taxation.[6] It therefore found "nothing exceptional" in requiring non-members to pay taxes to the Tribe, which, along with the federal, state, and local governments, contributes to the establishment of a civilized society on the reservation. *Merrion,* 455 U.S. at 138.

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[5] Arguments that general principles of taxation do not necessarily apply to tribal governments because the party being taxed has no ability to participate in tribal government must be given no weight. First, as discussed above, this Court has already found applicable a broad tribal right to tax activity or property within tribal boundaries regardless of taxpayer representation in tribal government. Second, many tribal governments allow non-members to appear at hearings and other governmental proceedings to provide testimony or input. The Navajo Tax Commission, for example, held public hearings before recommending adoption of a hotel occupancy tax. J.A. 16-17. Finally, government entities regularly impose taxes on persons or entities who are not represented before them. By their nature, for example, hotel occupancy taxes like that at issue in this case are borne mainly by persons who do not reside within the jurisdiction levying the tax.

[6] *See also* the Court's reference to "settled principles of taxation." *Merrion,* 455 U.S. at 151.

C. Under *Merrion*, A Tribe's Power To Tax Non-Member Activity Is Not Dependent On Trust Status Of The Land On Which The Activity Occurs And Is Not Limited To Transactions With The Tribe Or Its Members

Merrion correctly makes no distinction between trust land and land owned in fee by non-members. To the contrary, the Court quoted and emphasized the language from *Buster v. Wright* stating that a government's powers are diminished neither "'by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.'" *Merrion*, 455 U.S. at 143 (quoting *Buster*, 135 F. at 952). Petitioner nonetheless argues that *Merrion* is not applicable because it involved trust land.

Trust status is relevant to governmental power only where the power derives, in whole or in part, from the power to exclude. Trust status is therefore relevant when a tribe attempts to exercise a *regulatory* power, but it is irrelevant when a tribe exercises the power to tax. Tribal power of taxation emanates from another source—a tribe's inherent power to govern and to raise the revenues necessary to cover the costs of government. It would indeed be a rare circumstance in which a non-tribal taxing jurisdiction had legal title to property subject to its taxing power, and of course no such requirement exists under general principles of taxation.

The taxpayers' leasehold interests in *Merrion* precluded the Tribe from excluding the lessees from the property. The ensuing argument—*i.e.*, that the power to tax is derived from the power to exclude and therefore cannot be exercised—was made and expressly rejected by the majority in *Merrion*. *Merrion*, 455 U.S. at 137.

Petitioner further attempts to distinguish *Merrion* by noting that the taxpayers' leases in *Merrion* were with the tribe. Petitioner cites *Washington v. Confederated Tribes of the*

Colville Indian Reservation, 447 U.S. 134 (1980), to support its argument that a tribe has the power to tax only those transactions that significantly involve a tribe or its members. *Pet. Brf.* at 12, 23–25. Although *Colville* states that a tribe's interest in raising revenues "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services," 447 U.S. at 156–57, it does not limit taxation to only those activities. In fact, *Colville* ruled that both the tribe and the state could tax the same transaction because both entities had a "legitimate governmental interest in raising revenues," even though in any given situation one entity's interest may be stronger than the other's. *Id.* at 157. *See also*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (recognizing the power of tribal, state, and federal government to simultaneously tax the same transaction).

A tribe thus has authority to tax non-members to raise revenue under *Merrion* regardless of whether the non-member is transacting business with the tribe or its members, and regardless of the type of land on which the non-member is situated.

II. THE *MONTANA* TEST DOES NOT APPLY TO NON-REGULATORY TRIBAL TAXATION

A. The *Montana* Test, Which Applies When Determining If A Tribe Can *Regulate* The Conduct Of Non-Members, Does Not Apply To Determining The Validity Of A Tribal Tax Designed To *Raise Revenue*

Montana v. United States addressed the validity of legislation enacted by the Crow Tribe that sought to prevent non-members from hunting or fishing on lands within the Tribe's reservation that were owned in fee simple by non-members. 450 U.S. 544 (1981). The State of Montana disputed the Tribe's legislation, asserting that the State had

sole authority to regulate hunting and fishing by non-members on such lands. The Court analyzed the various treaties leading to the establishment of the current Crow reservation in context with its interpretation of Congressional intent as reflected in subsequent legislation, particularly the allotment acts that lead to non-Indian land ownership on the reservation. *Id.* at 557–61. The Court interpreted the allotment acts as divesting the Tribe of sovereign power over non-members beyond that necessary to protect and control self-government and internal relations, because they indicated congressional intent not to subject non-Indians to tribal regulation. *Id.* at 560 n.9, 561. While acknowledging that Congress repudiated the allotment policy with the Indian Reorganization Act of 1934, the Court inferred no symmetric revesting of tribal authority over non-Indians because they retained the right to continue to reside and own property on the reservation. *Id.* at 560 n.9, 560-61. Because Congress had not restored the tribes' authority to exclude non-Indian settlers from the fee lands, the tribes did not regain the lesser derivative power to regulate non-members' conduct on their properties. *Id.* The Court further concluded that, due to tribes' status as dependent sovereigns, in general, "the inherent sovereign powers of an Indian tribe do not extend to the activities of the nonmembers of the tribe." *Id.* at 565.

The Court acknowledged, however, that "Indian tribes retain sovereign power to exercise some forms of civil jurisdiction over non-Indians, even on non-Indian fee lands." *Id.* In particular, the Court noted that a tribe "may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *id.*, and a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *id.* at 566.

The Court has applied *Montana* and its exceptions on several occasions, but none of the cases in which it did so involved taxation. *South Dakota v. Bourland* involved tribal regulation of hunting and fishing by non-Indians within the reservation. 508 U.S. 679 (1993). The majority opinion reiterated the principle that a tribe's *regulatory* authority is derivative in large part of its power to exclude non-Indians from the reservation. *Id.* at 688-89. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* held that the Yakama Nation did not have power to zone non-member fee land in the area of the reservation open to the general public, but upheld the Nation's authority to zone non-Indian owned fee land in that part of the reservation closed to the general public. 492 U.S. 408, 424 (1989).

More recently, in *Strate v. A-1 Contractors*, the Court reemphasized that a tribe's presumptive authority to govern the conduct of a non-member emanates in large part from its practical legal capacity to exclude the non-member. 520 U.S. 438 (1997). *Strate* concerned a tort claim arising out of a traffic accident that involved non-Indians on a state highway within a federally granted right-of-way across the Fort Berthold Reservation. In holding that the Tribal Court lacked jurisdiction over the dispute, the Court characterized the right-of-way as equivalent to fee land for jurisdictional purposes under *Montana* because the Tribes could not exclude non-members. *Id.* at 456. Postulating that a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction with respect to non-members, the Court found it necessary to ascertain the scope of the Tribes' legislative authority. *Id.* at 453. The Court held that the Tribes had lost the inherent right to enact legislation governing usage of the highway when it lost the prerogative to exclude non-members from the right-of-way. *Id.* at 456. The Court concluded that because neither of the *Montana* exceptions was met, the Tribes necessarily lacked judicial jurisdiction over the claim. *Id.* at 456-59.

Montana and its progeny apply the general rule that a tribe has regulatory authority over non-Indians only where the tribe retains the power to exclude non-Indians from the land, unless one of the two *Montana* exceptions applies. The Court's reference to taxation in its articulation of the "consensual relationship" exception has been misunderstood, leading to the erroneous belief that taxation of non-Indians on fee land is generally subject to the *Montana* test. *Montana* and its progeny, however, are not tax cases—they are cases that address regulatory authority: [7] *Montana* and *Bourland* involved hunting and fishing rights; *Brendale* involved zoning; and *Strate* involved adjudicatory authority. These cases concerned tribal efforts to control or regulate *activities* or *conduct* and involved real or potential conflict between tribal and non-tribal jurisdictions.

Merrion—and not *Montana*—provides the analytic framework for determining the validity of non-regulatory tribal taxation of non-members, whether on trust land, fee land, or fee-equivalent land. This conclusion is inescapable when *Colville*, *Montana*, and *Merrion*—all decided within a 20-month period—are read together. *Colville* held that taxing schemes that merely intend to raise revenue are not regulatory in nature and therefore do not normally give rise to concerns regarding state or tribal regulatory jurisdiction. 447 U.S. 134. *Montana* prescribed the conditions under which tribes have authority to regulate non-members and parenthetically noted that taxation can have regulatory intent. 450 U.S. at 565-66. *Merrion*, the last of the three, pointed out that governments, including tribes, generally possess a broad authority to impose taxes intended to raise revenue to fund services that contribute to a civilized society throughout the jurisdiction.

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[7] The *Montana* Court itself stated, "[T]hough the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us in this case is a narrow one." *Montana*, 450 U.S. at 557.

455 U.S. at 140. The Court put its final imprint on this analysis in *Cotton Petroleum Corp. v. New Mexico* by allowing multiple taxation (state, tribal, and federal) of the same activity. 490 U.S. 163 (1989). The three governments had varying degrees of civil authority throughout the reservation and all provided services contributing to a civilized society. *Id.*

Taxation can be regulatory in nature, *see infra* at 18-23, but in its more common form a tax is simply a means of raising revenue to pay for the cost of government. The Court has long recognized the distinction between *regulatory* taxation and *revenue—raising* taxation. Indeed, it made just such a distinction in a case involving tribal taxation only ten months prior to its decision in *Montana*. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Moreover, the problems of compliance that may arise when a regulated party must comply with regulations imposed by multiple jurisdictions do not present themselves in the context of multiple taxation. *See id.* at 154-59. *Montana* and its exceptions would thus apply to a tribe's power to tax non-members on fee lands (or on fee-equivalent lands under *Strate*) *only* if the tax is designed to "regulate . . . the activities of nonmembers . . . ." 450 U.S. at 565. The validity of a tribal tax designed to raise revenue is accordingly subject to a different standard analysis—that set forth in *Merrion*.

B. The Court Has Repeatedly Distinguished Between Taxation That Is *Regulatory* In Nature And Taxation That Has Only A *Revenue-Raising* Purpose, And Has Specifically Made This Distinction In The Context Of Tribal Taxation

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, which was handed down only ten months prior to *Montana*, the Court upheld the Tribes' transaction tax on tobacco sales the legal incidence of which fell primarily on

non-Indians. 447 U.S. 134 (1980). The transactions occurred in retail outlets located on trust land. The Court held that the power to tax non-Indians was not inconsistent with the Tribes' dependent status and had not been preempted by Congressional legislation or state taxes on the same tax base. *Id.* at 156.

The Court also upheld the State of Washington's concurrent tax on non-member purchases even though the transactions occurred on trust land, holding that both governments possessed a legitimate interest in raising revenue to fund services. *Id.* at 157. The Court rejected the Tribes' assertions that Washington's tax "regulated" the sale of cigarettes, and that because the activity in question was conducted on trust land where the Tribes possessed presumptive civil regulatory authority, the State's tax was impermissible:

> A second asserted ground for the invalidity of the state taxes is that they somehow conflict with the Tribes' cigarette ordinances and thereby are subject to pre-emption or contravene the principle of tribal self-government. This argument need not detain us. There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. *Although taxes can be used for distributive or regulatory purposes, as well for raising revenue, we see no nonrevenue purposes to the tribal taxes at issue in these cases* . . . . Other provisions of the tribal ordinances do comprehensively regulate the marketing of cigarettes by the tribal enterprises; but *the State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on sales to nonmembers*. Hence, we perceive no conflict between state and tribal law warranting invalidation of the State's taxes.

Id. at 158-59 (emphasis added).

More recently, in *Jefferson County v. Acker*, the Court reaffirmed the distinction between revenue raising taxes and taxes used to accomplish regulatory goals. 527 U.S. 423 (1999). Jefferson County had imposed a broad occupational tax that extended to federal judges. The taxpayer judges contended that the tax represented an impermissible attempt by the county to regulate the federal judiciary, a power reserved solely for the federal government. The Court disagreed: "In practice, Jefferson County's license tax serves a revenue-raising, not a regulatory, purpose. Jefferson County neither issues licenses to taxpayers, nor in any way regulates them in their performance of their duties based on their status as license taxpayers." *Id.* at 440.

Because the tax did not regulate, and served only to raise revenues, it was upheld. *See also Michelin Tire Corp. v. Wages*, 423 U.S. 276, 286 (1976) (county *ad valorem* tax imposed upon imported goods held to "have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce"); *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 1995 U.S. App. LEXIS 24517 at *9-*10 (10th Cir. 1995) (finding that the state's tax on beer sold in Indian country was within its power to regulate sales of alcoholic beverages within Indian country: "Where the taxation is an integral part of the overall regulatory structure in a traditionally heavily regulated area, as opposed to a simple revenue measure, the tax may properly be considered to be regulatory and to fall within the regulatory authority." *Citing Colville*, 447 U.S. 134 at 158), *on remand from* 515 U.S. 450 (1995).[8]

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[8] Similarly, the Court has struck down taxes imposed by the United States Congress where the tax was designed not to raise revenue but to regulate in an area in which the Constitution has left regulation to the States. *See United States v. Kahriger*, 345 U.S. 22, 31 (1953) ("Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this

The courts have also made a distinction between regulatory taxes and revenue-raising taxes for purposes of the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits federal courts from enjoining the assessment, levy or collection of any state tax where a plain, speedy and efficient remedy is available in state court to the party contesting the tax. "These cases make a general distinction between broader-based taxes that sustain the essential flow of revenue to state (or local) government and fees that are connected to some regulatory scheme. Taxes fall within the scope of the Tax Injunction Act, but regulatory fees do not." *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir. 1997). *See also Marcus v. Kansas Dept. of Revenue*, 170 F.3d 1305, 1312 (10th Cir. 1999) (finding that a state assessment for disabled parking placards constitutes a regulatory fee because it is tied to the administrative costs of a specific regulatory scheme); *Hager v. City of W. Peoria*, 84 F.3d 865, 871 (7th Cir. 1996) (municipal ordinances requiring permits for trucks exceeding certain weight limit were regulations rather than taxes, even

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Court to declare the enactments invalid.") (footnote omitted), *overruled on other grounds, Marchetti v. United States*, 390 U.S. 39, 58 (1968). *See also United States v. Butler*, 297 U.S. 1, 59, 67-69 (1936) (holding beyond the taxing power an act taxing the processing of agricultural commodities and providing for payments to farmers from the taxes collected); *Hill v. Wallace*, 259 U.S. 20, 37 (1922) (striking down an act imposing a tax on the employment of child labor as a regulation beyond Congress's power). Although these cases are of less relevance today under the expansive modern interpretation of the commerce clause, *see, e.g., United States v. Darby*, 312 U.S. 100 (1941) (upholding congressional regulation of child labor under the commerce clause), they indicate that, in proper circumstances, the Court will inquire as to whether a regulatory tax is within the power of Congress. *See South Carolina v. Baker*, 485 U.S. 505, 527 n.16 (1988) ("Because we hold that Congress could have prohibited States from issuing any unregistered bonds by direct regulation, we necessarily reject South Carolina's argument that [26 U.S.C.] § 310(b)(1) is an impermissible regulatory tax because it imposes a tax on activities not subject to federal regulatory power.").

though the revenues from the assessments went into the general fund, because they "were passed to control certain activities, not to raise revenues").

The difference between a non-regulatory, revenue-raising tax and a tax employed as a part of a regulatory scheme is critical. Regulatory taxation differs from the usual revenue-raising tax in two key respects. First, unlike a regulatory tax, which is designed to regulate conduct, *e.g.*, *Hill v. Wallace*, 259 U.S. 20, 37 (1922) (tax designed to regulate child labor); *Hager v. City of W. Peoria*, 84 F.3d 865, 871 (7th Cir. 1996) (tax designed to regulate use of roads by large trucks), non-regulatory taxation does not attempt to proscribe behavior. Generally, taxes are enacted to raise revenue to fund government services. Although a regulatory tax may raise revenues for general governmental programs, it is not imposed for that purpose, but for its regulatory purpose. In fact, a completely effective regulatory tax may raise no revenue as it eliminates the conduct taxed. A revenue-raising tax, in contrast, is generally enacted with the hope that it will have a minimal effect on the activity taxed. The Navajo Hotel Occupancy Tax at issue for example, is not intended to deter guests from staying at hotels on the Navajo Reservation, because that would frustrate its purpose of raising revenue.

Second, taxing power may be, and commonly is, simultaneously exercised by overlapping jurisdictions, each providing complementary services to the direct or indirect benefit of all those with nexus to the jurisdiction. This simultaneous existence and exercise of taxing power by overlapping jurisdictions is the rule rather than the exception in the tax area, and does not present conflicting jurisdictional claims such as those that the Court was called on to resolve in regulatory contexts such as *Montana* and its progeny. The Court specifically addressed this issue in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). After *Merrion* upheld the Jicarilla Apache's right to impose severance taxes

on non-members, an affected non-member taxpayer, Cotton Petroleum Company, challenged the State of New Mexico's severance tax on that same activity, arguing that the levy was invalid because the tax far exceeded the value of the State's on-reservation services and that it represented impermissible double taxation. The Tribe, in its *amicus* brief, contended that the State's tax illegally thwarted its own ability to raise taxes and diminished the value of its oil and gas leases. As it had in *Colville*, 447 U.S. at 156-57, the Court upheld the simultaneous exercise of state and tribal taxing jurisdiction: "There are, therefore, three different governmental entities [federal, state, and tribal], each of which has taxing jurisdiction over the non-Indian wells . . . . Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over all Cotton's leases." *Cotton Petroleum Corp.*, 490 U.S. at 188-89.

Common examples of multiple taxation by overlapping jurisdictions are familiar to most of us. "Concurrent federal and state taxation of income, of course, is a well-established norm." *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 448 (1980). Moreover, in the realm of property taxation, numerous jurisdictions levy on the same property. Commonly a city, county, school district, hospital district, etc., each with its own separate governmental responsibilities to fund, will levy separate taxes on the same property. In sum, the power to tax need not be, and indeed rarely is, an exclusive one.

III. UNDER *MERRION*, THE NAVAJO HOTEL OCCUPANCY TAX IS A VALID NON-REGULATORY TAX LEVIED FOR THE PURPOSE OF RAISING REVENUES TO PAY FOR THE COST OF LEGITIMATE GOVERNMENT SERVICES

The District Court of New Mexico upheld the Navajo Hotel Occupancy Tax by applying *Montana's* consensual relationship test to tribal powers of taxation and by also applying the "benefits of civilized society" standards from *Merrion*. Pet. App. 63a. In deciding that *Montana* was applicable, the District Court noted that both *Montana* and *Strate* specifically mention that "a tribe may regulate, through taxation . . . . The Supreme Court's inclusion of taxation power within its discussion of the consensual relationships test indicates that the test applies to [the taxation] form of tribal jurisdiction as well as to tribal regulatory and judicial authority over non-members." *Id.* At the same time, the District Court recognized that *Merrion* is not limited to cases involving Indian trust lands and that "fairness indicates that [a tribe] be allowed to impose taxes to help pay for [governmental] services." *Id.*

In a majority decision, the Tenth Circuit also upheld the Navajo Hotel Occupancy Tax, ruling that (1) the *Montana* test was controlling, Pet. App. 9a, (2) the fee status of the land did not in and of itself preclude tribal taxation, *id.* at 25a, (3) a "balancing test" derived from *Merrion* was an appropriate elaboration of the *Montana* consensual relationship exception in the area of taxation, and *id.* at 13a-14a, (4) the tax fell within the consensual relationship exception. *Id. at 28a-30a.* Unlike the District Court, the Tenth Circuit never explained why it thought that *Montana* should apply as part of its analysis.

Despite looking to *Montana*, the Tenth Circuit nonetheless emphasized that the tax was in substance and purpose similar to state and local occupancy taxes consistently upheld by the

courts: "We conclude that the same principles apply as in those other cases in which hotel occupancy taxes have been subject to judicial review." *Id.* at 30a. The court further recognized that taxation by its nature is less burdensome than the exercise of other forms of tribal authority over non-members and that the burden of the Navajo tax was "minimal" and did not materially restrict non-members' activities. *Id.* at 30a-31a. In its balancing test, the Tenth Circuit held that the burden of the tax was not disproportionate to the services provided and therefore the Navajo Hotel Occupancy Tax was valid. *Id.* at 31a-32a.

Amici agree with the lower courts that ***if*** *Montana* is the applicable rule, then the tax should be upheld under the "consensual relationship" exception. The *Montana* test simply does not apply, however, because the Navajo Hotel Occupancy Tax is not a regulatory tax. The courts below failed to distinguish between regulatory taxation and revenue-raising taxation. Cognizant that *Montana*'s consensual relationship exception referred to "taxation," the Tenth Circuit, like the District Court, concluded that it should somehow incorporate the *Montana* test in its analysis. Because the court also recognized that *Merrion* applies beyond trust property, it attempted to reconcile *Montana* and *Merrion* by extracting a "balancing test" from *Merrion* and grafting it onto *Montana*'s "consensual relationship" exception. As a practical matter, the court's balancing test between taxes and services on a case by case, taxpayer by taxpayer basis would impose a burden on tribes that no other governmental body is required to carry in order to validate its tax system and would be difficult for the courts to apply. Moreover, had the Tenth Circuit distinguished between regulatory and revenue-raising taxation, it would not have needed to apply such a balancing test nor fit the tax within the *Montana* exception. Instead, the tax would simply have been evaluated under "general principles of taxation" as prescribed by *Merrion*.

This Court has recognized the need to distinguish between regulatory taxation and revenue raising taxation. In *Colville*, handed down less than a year prior to *Montana*, and more recently in the *Jefferson County* case, the Court has made the distinction between regulation and taxation for revenue purposes in both a tribal and a non-tribal context. *Colville*, 447 U.S. 134 (1980); *Jefferson County v. Acker*, 527 U.S. 423 (1999). *See also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Clarification of the distinction here, along with the corresponding reaffirmation of the "general principles of taxation" prescribed by *Merrion*, will bring clarity and certainty to an area in great need of both.[9]

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[9] The United States Court of Appeals for the Ninth Circuit has held on two occasions that *Merrion* and not *Montana* governs the validity of tribal taxes on fee lands within reservation boundaries. *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *rehearing denied, opinion amended*, 2000 U.S. App. LEXIS 92, *cert. denied*, 120 S. Ct. 1964 (2000). In *Red Wolf*, the Ninth Circuit reaffirmed its earlier holding in *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), that the tribe could tax a railroad right-of-way, even as it held that the tribe could not adjudicate a tort claim arising within the same right-of-way, which the court considered to be the equivalent of fee lands for jurisdictional purposes under *Strate*. The *Red Wolf* panel, which included retired Justice White (who participated in the *Merrion* and *Montana* decisions), reconciled its decisions as follows:

> [T]he Tribe's power to tax the right-of-way does not create civil jurisdiction over non-members arising out of accidents occurring on the right-of-way. *The power to tax is not equivalent to the right to exercise civil jurisdiction over tribal land.* Indeed, *Merrion* rejected the theory that a tribe's taxation power was coextensive with its right to exclude non-members from tribal lands. Thus, because *a tribe's taxation power is broader than its civil adjudicatory authority over non-members*, the Tribe's authority to tax the right-of-way is not dispositive.

Red Wolf, 196 F.3d at 1063-64 (opinion joined in by retired Justice White) (omitting footnote) (emphasis added). [Footnote continues on next page.]

The Navajo Hotel Occupancy Tax (H.O.T.) at issue is a revenue raising tax—it is not a regulatory tax designed to curb or eliminate hotel stays or other business of the petitioner. The H.O.T. imposes an 8% tax on all hotel rooms located within the reservation, whether on fee land or trust land. J.A. 15-17; Pet. App. 67a. As the Tenth Circuit noted, this tax is like similar hotel taxes imposed by the states of Arizona and New Mexico. Pet. App. 28a-29a. Such tax is for revenue raising purposes to cover the cost of governmental services provided or available to the public, including Petitioner and its hotel guests.[10]

Most recently, however, in *Big Horn County Electric Cooperative v. Adams*, the Ninth Circuit held that the Crow Tribe exceeded its regulatory authority when it assessed a 3% tax on the value of the taxpayer's rights-of-way over the reservation through which the taxpayer ran its transmission lines. 219 F.3d 944 (9th Cir. 2000). The Ninth Circuit held (erroneously) that the taxpayer's rights-of-way were equivalent to fee land and that *Montana* applied. *See id.* at 953 (overruling *Burlington Northern R.R. Co. v Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991)). In so ruling, the panel relied on the decision in *Red Wolf*, 196 F.3d 1059, but ignored the distinction that the *Red Wolf* panel made between regulatory or adjudicatory powers on one hand and taxation on the other.

[10] For example, the federal and state highways over which Petitioner's guests travel to reach the hotel property are jointly patrolled by the Arizona state and Navajo tribal police. Pet. App. 57a. The tribal police force is the primary provider of police protection. *Id.* A Navajo police department substation is located in Cameron, and a 911 emergency call from Atkinson would be forwarded to the Navajo police. *Id.* The Navajo fire department and the Bureau of Indian Affairs fire department, both located 25 miles away in Tuba City, provide the primary response to calls from the Cameron area. *Id.* at 57a-58a; J.A. 86-89, 91. The Navajo Nation's Emergency Medical Service Department provides emergency medical care to the Cameron area. Pet. App. 58a. *See also* Pet. App. 27a-28a n.13. Additionally, the Navajo Nation provides health services to both members and non-members through the Navajo Nation Division of Health, including health inspections of all food vendors located on the reservation. Pet. App. 87a. The Navajo Nation's Tourism Department provides facilities for the health and safety of visiting tourists. *Id.* The

The Navajo H.O.T. has no regulatory purpose whatsoever. The Tribe does not tell Petitioner whom it may let its rooms to, what it may charge for those rooms, or in any other way direct Petitioner's conduct of its business.[11] Nor does it regulate in any way the hotel guests who are subject to the tax. Because the Navajo tax has a revenue-raising purpose meant to defray the costs of government services, it must not be analyzed under the *Montana* framework, which addresses tribes' regulatory power over non-members on fee lands. Rather, the proper analysis of the Navajo H.O.T. takes place under the standards set forth in *Merrion* and general principles of taxation referred to in *Merrion*.

There is nothing extraordinary about requiring a business or, as here, its customer, to contribute through taxes to the general cost of government if its economic activities or contacts with the taxing jurisdiction establish a nexus.

Navajo Nation also funds economic and community development, social services, educational programs, and a host of other activities. *Id.*; J.A. 107-110.

[11] Petitioner, on page 22 of its brief, suggests that the enforcement mechanisms of the Navajo tax (i.e., record-keeping requirements, lien creation procedures, etc.) constitute regulation even if the tax itself does not. The Court has consistently rejected the argument that a lawful tax should be struck down because it imposes minimal regulatory burdens. As explained in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Court held in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976), "Indian retailers on an Indian reservation may be required to collect all state taxes applicable to sales to non-Indians. We determined that requiring the tribal seller to collect these taxes was a minimal burden justified by the State's interest in assuring the payment of these concededly lawful taxes." 498 U.S. 505, 512 (1991). Four years later, in *Colville*, the Court reiterated that "the state may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing the tax [on sales to non-Indians]," and that those burdens cannot be used to invalidate an otherwise valid tax. 447 U.S. at 151. *See also, Department of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 75 (1994).

Merrion, 455 U.S. at 138. Atkinson owns property on the reservation, employs 120 people and conducts an active business. Its guests are visitors to the reservation, and enjoy the benefits of tribal government and tribal services. Under "general principles of taxation" there is simply no question that there is a nexus sufficient to support the taxation. Furthermore, the services made available by the Tribe provide equally compelling support for taxation. *See id.* at 138 n.5 ("We agree with [Circuit Court] Judge McKay's observation that '[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes'") (quoting *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 550 (10th Cir. 1980) (McKay, J. concurring)). *See also Merrion*, 455 U.S. at 137. The revenues raised by the Navajo Nation are used to support the public good. Petitioner's business and guests benefit from a safe and healthy environment made possible by the government services provided by the Navajo Tribe.

To suggest that there must be a more direct benefit for the disputed tax to be valid flies in the face of a long line of case precedent. As the Court noted in *Cotton Petroleum Corp. v. New Mexico*: "[T]here is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the community where the taxpayer is located—must equal the amount of its tax obligations." 490 U.S. 163, 189-190 (1989).

Under the principles set forth in *Merrion*, general principles of taxation are applicable to a tribal revenue-raising tax just as they would be to a tax imposed by any other governmental entity. Under such principles, the petitioner's attempt to avoid the Navajo H.O.T. must fail and the tax must be upheld. Like the lessee in *Merrion*, Petitioner and its hotel

guests that are subject to the Navajo H.O.T. "benefit from the provision of police protection and other governmental services, as well as from the 'advantages of a civilized society' that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-38 (quoting *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980)).

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

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JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, Members of the Navajo Tax Commission; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY; THE SPIRIT LAKE TRIBE; THE SISSETON-WAHPETON SIOUX TRIBE; THE GRAND PORTAGE BAND OF CHIPPEWA; AND THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

The Shakopee Mdewakanton Sioux (Dakota) Community, the Sisseton-Wahpeton Sioux Tribe, the Spirit Sioux Lake Tribe, the Grand Portage Band of Chippewa Indians, and the Sac and Fox Tribe of the Mississippi in Iowa, are federally-recognized Indian tribes, exercising inherent powers of self-government.[1]

Amici represent a broad range of tribal government interests, and have various land ownership histories. All reservation lands of the Grand Portage Band, Spirit Lake Tribe and Sisseton-Wahpeton Sioux Tribe include lands owned by non-Indians in fee. All reservation lands of the Shakopee Mdewakanton Sioux (Dakota) Community and Sac & Fox of the Mississippi in Iowa are held by the United States in trust for the respective tribes.

The presence and activities of non-Indians within these Tribes' reservation boundaries creates a substantial need, both actual and potential, for tribal governmental services. A wide range of governmental services are afforded by *Amici* to all non-tribal members on reservation lands, including police, fire, emergency medical, housing, education, financial and in-kind assistance. At issue here is the power of *Amici* to govern and to raise revenues to pay for the increased costs of government resulting from the activities of non-Indians on reservation lands. Thus, *Amici* strongly support Respondent, the Navajo Nation.

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[1] Pursuant to Rule 37.6 of this Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, its members or counsel, have made any monetary contribution to the preparation or submission of this brief.

All parties have consented by joint written stipulation to the filing of this Amicus Brief.

SUMMARY OF ARGUMENT

Amici agree with the Navajo Nation that this Court's decision in Montana v. United States, 450 U.S. 544 (1981), does not apply to the present matter. The Navajo Nation's hotel occupancy tax is imposed strictly for revenue-raising purposes, and therefore does not involve the assertion of regulatory jurisdiction over petitioner's guests. The Tribe's tax is imposed for the purposes of promoting tourism and tourism development, a simple revenue measure that benefits petitioner and its guests.

The source of the Tribe's power to tax non-Indians "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982). Because the activities of petitioner's guests affect the Tribe's ability to operate its government, the Tribe has a significant interest in raising revenues to defray the costs of providing governmental services that benefit petitioner's guests. The application of Montana to limit tribal taxing authority in this case would directly interfere with the Navajo Nation's power to fund and deliver essential governmental services, and would divest the Nation of a fundamental aspect of sovereignty.

All of Petitioner's guests voluntarily enter the Navajo Reservation and remain within the Navajo Nation's protection. There is substantial evidence that governmental services provided by the Tribe benefit the non-members subject to the

tax, and thus the non-Indian activity is "relevantly related to the tribe's tax. Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1263 (10th Cir. 2000). The operation of Petitioner's business and the activities of its guests have a substantial connection to the Navajo Nation, its members and its lands. The Navajo Nation's provision of services which benefit petitioner's guests, its involvement and interest in promoting tourism activities within reservation boundaries, and the impact of tourism on the Tribe's ability to govern all establish the necessary connection between the taxpayer and the Tribe.

I. MONTANA IS NOT CONTROLLING PRECEDENT BECAUSE THE NAVAJO NATION'S REGULATORY AUTHORITY IS NOT AT ISSUE.

There is a logical basis for distinguishing an Indian tribe's power to impose a tax from its power to regulate non-Indian activity on fee lands. This Court has confirmed tax schemes may be entirely revenue-raising in nature. Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 158-59 (1980). The Navajo Nation's hotel occupancy tax is a simple revenue measure unrelated to any regulatory purpose, and thus does not concern the source and extent of the power of an Indian tribe to regulate the use of non-Indian fee land. The Navajo Nation is not attempting to "regulate, through taxation," the performance of activities on non-Indian fee lands, nor impair any rights pertaining to non-Indian fee lands, Montana, 450 U.S. at 565-66,[2] it is simply

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[2] Amicus Curiae, Proper Economic Resource Management, Inc., submit that a ruling in favor of the Navajo Nation will subject non-members conducting businesses on fee lands to claims of tribal regulation that infringe upon civil and property rights of non-Indians. Unlike Montana and Brendale, this case does not involve a situation where the individual property rights of a non-Indians are affected. *See* Montana, 450 U.S. at 544; *see also* Brendale

engaged in raising general revenues for the operation of government.

A. *The Navajo Nation's authority to tax non-Indians is of a different character than the Navajo Nation's authority to regulate non-Indian activity on fee lands.*

Unlike Montana, this case is not concerned with the boundaries between state and tribal regulatory authority. In Montana, the State asserted its authority to regulate hunting and fishing by non-Indians within the reservation. 450 U.S. at 549. And, unlike Strate v. A-1 Contractors, principles that define the boundaries between state and tribal adjudicatory jurisdiction are not at issue here. 520 U.S. 438, 442 (1997) (holding that a civil action between non-members "falls within state or federal regulatory and adjudicatory governance"). Imposition of the Navajo Nation's hotel occupancy tax does not intrude on any regulatory area occupied by state or federal government.

While conflict between tribal and state regulatory structures requires analysis to determine which sovereign will regulate certain activity, in "the field of taxation . . . the laws of both State and Tribe may be enforced simultaneously." Gila River Indian Community v. Waddell, 91 F.3d 1232, 1237 (9th Cir. 1996); *see also* Colville, 447 U.S. at 158 (holding that dual systems of pure taxation are not inherently conflicting); Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964, 968 (10th Cir. 1994) ("[w]here the taxation is an integral part of the overall regulatory structure in a traditionally heavily regulated area, as opposed to a simple revenue measure, the tax

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v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

may properly be considered to be regulatory and to fall within the regulatory authority."). This Court long ago formulated a distinction between taxes and regulatory fees in Head Money Cases (Edye v. Robertson), 112 U.S. 580, 589-90 (1884). There, the Court held that, unlike tax revenue, money raised by regulatory fees "is appropriated in advance to the uses of the statute, and does not go to the general support of the government." Id., at 595-96.

Taxes imposed for regulatory purposes can only be imposed upon those persons and activities subject to the regulatory jurisdiction of the taxing authority. San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico, 967 F.2d 683, 685 (1st Cir. 1992).

> The classic 'regulatory fee' is imposed by an agency upon those subject to its regulation. It may service regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may service such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

Id. (citations omitted); *Accord* Chicago & N. Western Transp. v. Webster County, 71 F.3d 265, 267 (8th Cir. 1995). Both in definition and in its application, the Navajo Nation's hotel occupancy tax is imposed strictly as a revenue raising measure and not as an exercise of civil regulatory jurisdiction over Petitioner's guests.

Given that the hotel occupancy tax is imposed strictly for revenue-raising purposes, and therefore does not require the assertion of regulatory jurisdiction over Petitioner's guests, the

Navajo Nation's general interest in raising revenues to defray the costs of providing services that benefit Petitioner's guests is sufficient. This Court has recognized that the validity of a tax is determined by its purpose. *See* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514 (1937). The district court found that "the Navajo Hotel Occupancy Tax "is imposed for the purposes of promoting tourism and tourism development," a benefit to Appellant and its guests . . . . " Atkinson, 210 F.3d at 1262 n.13. The tourism department of the Navajo Nation actively promotes tourism in the Cameron area. Id. Tourism has a direct impact on the Navajo Nation's ability to operate its government and manage its territory. The undisputed facts in this case are that the Navajo Nation is the primary provider of governmental services to Petitioner and its guests. Petitioner wrongly focuses on the fact that, fortunately, these services are not often needed, while the courts below correctly emphasize that tribal services are available to all guests and the Navajo Nation maintains its readiness to assist any guest who needs services. *See* Thomas v. Gay, 169 U.S. 264 (1898) (holding that "benefits always flow from the appropriation of public moneys to such purposes, which corporations in common with natural persons receive in the additional security to their property and profits.").

B. *The power to tax derives from fundamental sovereignty.*

In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), this Court held that the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." Id., at 137. The source of the power to tax non-Indians does not "derive fully from the Indian tribe's power to exclude non-Indians from tribal lands." Rather, the power to tax "derives from the tribe's general authority, as sovereign, to control

economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from person or enterprises engaged in economic activities within that jurisdiction." Merrion, 455 U.S. at 137.

The source of the Tribe's authority to tax was at issue in Merrion, because the Navajo Nation lacked the power to exclude the non-members from tribal lands under leases entered into with the Navajo Nation. Merrion relies on Buster v. Wright, 135 F. 947 (8th Cir. 1905), to dispense with "the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands." Id. at 143. In both Merrion and Buster, each tribe lacked the power to exclude non-Indians. In Buster, the court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners." 135 F. at 952. As noted in Merrion, "[e]ven though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the [Buster] court held that the Tribe retained its power to tax." Merrion, 455 U.S. at 143, *citing* Buster, 135 F. at 952. Thus, the Court in Merrion stated that the result in Buster "confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government." Id. at 144.[3] Like the tribes

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[3] The Court noted that both the classic treatise on Indian Law, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 142 (1982 ed.), and its subsequent revision by the Department of the Interior, Federal Indian Law at 438 (1958), cite Buster v. Wright "for the proposition that the power to tax is an inherent sovereign power not dependent on the power to exclude." Merrion, 455 U.S. at 144.

in Merrion and Buster, the source of the Navajo Nation's power to tax Petitioner's guests derives not from the power to exclude, but from its inherent "power to govern and to raise revenues to pay for the costs of government." Id.

In Colville, the Court found no implicit divestiture of the tribe's power to tax non-Indians, because it saw "no overriding federal interest that would necessarily be frustrated by tribal taxation." 447 U.S. at 154.[4] The Court observed that "federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity." Id. at 153, *citing* Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905). The Court's understanding that federal law "has not worked a divestiture of Indian taxing power" was based in part on an opinion of the Solicitor of the Department of the Interior.

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

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[4] Although Colville dealt with taxation of non-Indian activities occurring on trust lands, the Court cited with approval Buster v. Wright and Morris v. Hitchcock, 194 U.S. 384 (1903), each of which involved taxation of non-Indian activities on fee lands. 447 U.S. 153. In Colville, "the Court's rationale requires a tribal interest in the subject matter to justify a tribal tax. Use of trust land supplies such an interest; on fee land the interest must be based on other circumstances." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 434 n.27 (1982 ed.).

Colville, 447 U.S. at 152-53, *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934).

II. INHERENT TRIBAL TAXING AUTHORITY CANNOT BE ABROGATED BY IMPLICATION OR JUDICIAL FIAT.

Because a fundamental distinction exists between the power to tax and the power to regulate, and in view of the absence of any exercise of regulatory jurisdiction by the Navajo Nation in this case, Montana is not applicable here.

In light of the Navajo Nations' unique *domestic* sovereign status, the federal government has assumed vital responsibilities of protection and trust. Those responsibilities demand that federal policies supporting the exercise of inherent tribal powers be addressed when considering tribal taxing authority.[5] Further, because the tribal authority to tax is a fundamental attribute of sovereignty, it cannot be defeated by implication, but only express Congressional action.

A. *The power to tax is vital to tribal self-government.*

As this Court noted in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), the Federal Government is "firmly committed to the goal of promoting tribal self-government." Id., at 334-335, *citing* Indian Financing Act

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[5] In Strate, this Court held that a determination of tribal sovereignty must be made by the court before invoking the Montana test. *See* Strate, 520 U.S. at 449, *citing* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985) (the existence and scope of tribal jurisdiction " will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.").

of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et seq.; *see also* Fort Berthold Reservation v. Wold Eng'g., P.C., 476 U.S. 877, 890 (1986) (referring to "Congress' jealous regard for Indian self-governance"). This Court acknowledged that "[t]he power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs." Kerr-McGee Corp. v. Navaho Tribe of Indians, 471 U.S. 195, 201 (1985).[6] As is well established by Congressional action and this Court's decisions, the power to tax is a vital component of federal policy that supports the exercise of inherent sovereign powers. As this Court stated in Merrion, "the views of the three federal branches of government, as well as general principles of taxation, confirm that Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services." 455 U.S. at 140. The application of Montana to constrain the Navajo Nation's power to tax non-Indians who benefit from significant governmental services, is at odds with important federal policy and this Court's decisions.

B. *Fundamental attributes of retained inherent sovereignty can only be divested by Congress.*

As discussed above, this Court has repeatedly recognized that tribes retain the inherent sovereign power to tax

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[6] The exercise of the power to tax is essential to Indian self-determination, which is a cornerstone of federal Indian policy. *See, e.g.*, 25 U.S.C. § 450(a) (Indian Self-Determination and Education Assistance Act) ("The Congress ... finds that ... the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons."); 25 U.S.C. §§ 461-479 (Indian Reorganization Act) (a congressional policy encouraging tribal self-determination).

non-members. *See* Merrion, 455 U.S. at 137; Colville, 447 U.S. at 152-54. The inherent authority of tribal government over reservation lands cannot be taken away except by Congress. United States v. Mazurie, 419 U.S. 558 (1975). "One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed." COHEN at 142, *citing* Buster v. Wright, *supra*, and Morris v. Hitchcock, 194 U.S. 384 (1903). "A fundamental principle of inherent tribal sovereignty is that it can only be limited when it has been expressly or implicitly divested by Congress." Williams v. Lee, 358 U.S. 217, 223 (1959) ("If this power is to be taken away from them, it is for Congress to do it."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978). In the absence of "clear indications" that Congress has deprived the Navajo Nation of its power to impose the hotel occupancy tax, the Navajo Nation retains that power. *See* Merrion, 455 U.S. at 152.

Courts, whether federal or state, lack the authority to diminish inherent tribal sovereignty. Only Congress has plenary authority over Indian tribes, Escondido Mutual Water Co. v. La Jolla Bands of Mission Indians, 466 U.S. 765, 788, n. 30 (1984) ("all aspects of Indian sovereignty are subject to defeasance by Congress"), and can "limit, modify, or eliminate" altogether the inherent sovereignty of Indian tribes, Santa Clara Pueblo, 436 U.S. at 56.[7] The jurisdiction of federal courts is

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[7]This authority is primarily conferred by the Indian Commerce Clause, Art. I, sec. 8, cl. 3, United States Constitution, United States v. Wheeler, 435 U.S. 313, 322-23 (1978), and, to a lesser extent, by the Treaty Clause, Art. II, sec 2, United States Constitution.

not co-extensive with the authority of Congress to limit tribal sovereignty. Because the constitution grants to Congress singular power to diminish or abrogate tribal rights altogether, this Court has been hesitant to act to diminish inherent attributes of tribal sovereignty absent clear congressional expressions of intent, and has said, ". . . until Congress acts, the tribes retain their existing sovereign powers." Wheeler, 435 U.S. at 323. "Because tribes retain all inherent aspects of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." Merrion, 455 U.S. at 149 n.14. Further, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [the Court] tread lightly in the absence of clear indications of legislative intent." Santa Clara Pueblo, 436 U.S. at 60.

The application of Montana to limit tribal taxing authority in this case would directly interfere with the Navajo Nation's power to fund and deliver governmental services and provide "'the advantages of a civilized society' that are assured by the existence of tribal government." Merrion, 455 U.S. at 137-38 In Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., this Court upheld the doctrine of tribal sovereign immunity "on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency." 523 U.S. 751, 757 (1998), *citing* Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe, 498 U.S. 505, 510 (1991). In deference to Congress' role in "reforming tribal immunity," the Court declined to confine sovereign immunity to transactions on reservations or to noncommercial activities. Id., at 759-60. The Court stated: "Congress, subject to constitutional limitations, can alter its limits through explicit legislation. . . . Congress is in a position to weigh and accommodate the competing policy concerns and

reliance interest. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area." Id., at 757. The Court noted that on occasion Congress has authorized suits against Indian tribes and "has always been at liberty to dispense with such tribal immunity or to limit it." Id., at 759. Caution and deference to the role of Congress is required here, because the power to tax is a fundamental attribute of sovereignty and Congress has not acted to limit or divest Indian tribes of such authority.

III. THE PROPER ANALYTICAL FRAMEWORK HERE IS THE NEXUS OF THE TAX IMPOSED TO THE BENEFITS ACTUALLY OR POTENTIALLY DERIVED FROM THE GOVERNMENT IMPOSING THE TAX.

Both Colville and Merrion recognized that before a tribe has jurisdiction to exercise its sovereign authority and tax activities involving non-Indians, there must be a nexus between the tribe and the non-Indian activity. *See* Coville, 447 U.S. at 152; Merrion, 455 U.S. at 137. Here, the nexus of the activity subject to the tax imposed does not involve the legal status of the land. Indeed, this Court has never attempted to scrutinize the situs of every aspect of non-member activity when recognizing tribal taxing authority. *See* Id. at 144 (holding that the tribe's "authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.").

A. *There is a substantial relationship between the subjects and benefits of the hotel occupancy tax.*

Petitioner urges that the Navajo Nation is required to establish a formal consensual relationship, such as a contract, with every hotel guest before imposing its hotel occupancy tax.

Montana's first exception is concerned with due process, although Congressional policy with respect to Indian tribes, not the constitutionality of the tax, is involved. If due process concerns are relevant, this Court's process of limiting tribal taxing authority should adhere to other jurisdictional precepts applicable to state taxing authority. In the context of taxation, no formal gesture of consent is required to establish state or federal jurisdiction over non-citizens. The assertion of state taxing authority merely requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax . . . . " Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-345 (1954). Moreover, denial of the right to participate in the political process has never been construed to wholly divest the exercise of sovereignty over the excluded class. *See* Duro v. Reina, 495 U.S. 676, 707 (1990) (Brennan, J., dissenting) (stating that participation in the political process has never been held to be a "prerequisite to exercise of criminal jurisdiction by a sovereign").

This Court previously held that "[w]hatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority." Merrion, 455 U.S. at 147. Because the power to tax derives from tribal sovereignty itself, Merrion, 455 U.S. 130, Colville, 447 U.S. 134, the Tenth Circuit properly applied a test that requires an examination of "the nature of the relationship between [Petitioner's] guests and the Tribe and the extent to which the Tribe provides services to those guests while they are on the reservation, compared to the burden place on those guests by the [Hotel Occupancy Tax]." Atkinson, 210 F.3d at 1255 (citation omitted). The availability and provision of services to Petitioner's guests by the Navajo Nation, the Navajo Nation's involvement and interest in promoting tourism activities within reservation boundaries, and the impact of

tourism on the Navajo Nation's ability to govern all establish the necessary connection between the taxpayer and the Navajo Nation. This case does not involve a situation where the Navajo Nation has had nothing to do with the non-member's activity, "save tax it." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 186 (1989).

The Tenth Circuit held that by entering the Navajo Nation Reservation and "availing themselves of the services provided by the Tribe," Petitioner's guests submitted to tribal taxing jurisdiction. Atkinson, 210 F.3d at 1263 (holding that the non-members consensual relationship "is one of implied consent, or privilege and tax, similar to that set forth in Buster"). "In sum, the Tribe provides [Petitioner's] overnight guests with the 'benefits of civilized society' while the guests are present, and the presence of the guests creates a greater need, both actual and potential, for tribal services." Id. This approach is consistent with this Court's treatment of taxing authority, generally. The broad inquiry is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." Asarco, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982) (citation omitted).

A concept of tribal sovereignty requiring consent from individuals before a tribe would be permitted to exercise its authority to tax, does not recognize inherent powers of self-government over territory and the persons within it, and relegates tribes to little more than private, voluntary organizations. Chief Justice John Marshall recognized that tribal sovereignty includes a geographic component. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538-40 (1832); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 457 (1989) ("tribal sovereignty is in large part

geographically determined"); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (observing that the Court has repeatedly recognized a significant geographical element to tribal sovereignty).

If the consensual relationship requirement was controlling, non-Indians could easily defeat a tribal tax by extinguishing all direct commercial contact with the tribe. Yet, the Navajo Nation affords opportunities, benefits, and protection to all non-Indian tourists within the exterior boundaries of its Reservation, regardless of whether any tourist has a first-hand relationship with the Navajo Nation. Unless the Navajo Nation can collect the hotel occupancy tax, Petitioner and its guests (as well as all others conducting business in Indian country) will capitalize upon the opportunity to receive the benefits of government without sharing the cost of tribal government. The Navajo Nation's power to generate revenue for essential governmental services cannot be diminished or abrogated simply because the non-Indian has not formally consented to the tribal tax.

Indian tribes have a significant interest in raising revenues for essential governmental programs "when the revenues are derived from value generated on the reservation by activities involving the Tribe and when the taxpayer is the recipient of tribal services." Colville, 447 U.S. at 156-57. Here, the value taxed by the hotel occupancy tax is generated from and dependent on the geographic location of Petitioner's business within Indian country, trade with Tribal members, the development of tourism by the Navajo Nation, the close proximity to a Tribal member labor force, as well as the "advantages of a civilized society assured by the existence of tribal government." Merrion, 455 U.S. at 137-38. The increased burden on tribal government and drain on tribal resources resulting from the presence and activities of

Petitioner's guests within the boundaries of the Reservation gives the Navajo Nation a substantial interest in imposing its tax. *See e.g.,* Crow Tribe of Indians v. State of Montana, 650 F.2d 1104, 1114 (9th Cir. 1981) (the court recognized that a state's legitimate revenue-raising interests include unquantifiable interests such as "strains on state and local governments to provide roads, schools, utilities, fire and police protection, recreation and health facilities, and other more subtle benefits such as a trained work force and an organized government and system of laws").

This is not a case of minimal contact between the activity taxed and the taxing jurisdiction. The operation of Petitioner's business and the activities of its guests have a substantial connection to the Navajo Nation, its members and its lands. Petitioner's trading post houses a large collection of Navajo arts and crafts, its restaurant serves Navajo foods, and its hotel guests are invited to enjoy the tribal ambiance of the trading post, which has a long history of trading with Tribal members. It would not comport with principles of fairness and justice to allow a business enterprise, whose overriding business purpose has been the maximum exploitation of Indian commerce and tribal-related tourism, to engage in activities free from tribal taxing authority simply because direct physical contacts with the Navajo Nation have been reduced to a minimum. This is not a case where the Navajo Nation attempts to appropriate a portion of the value of Petitioner's business activities that has no relationship to the benefit it provides.

B. ***If this Court must decide this case under a test not based on Merrion, the result reached by the Tenth Circuit should be upheld.***

This Court's most recent pronouncement on the Montana test is Strate, 520 U.S. at 438. In Strate, this Court held that a tribal court did not have jurisdiction over a tort which occurred on a state highway running through a reservation. The District Court, the Court of Appeals, and Petitioner all interpret the above holding in Strate to mean that there must be a nexus between the Navajo Nation and the transaction at issue. District Court Opinion at 13; Atkinson, 210 F.3d at 1263; Petitioner's Brief at 33. Both courts found that there was a nexus between the tax at issue and the services rendered by the Navajo Nation. The Court of Appeals stated "that activity [of Petitioner and its guests] is relevantly related to the Tribe's tax," Atkinson, 210 F.3d at 1263, and that Petitioner "made no attempt to argue that there was a great disparity between the amount of the tax paid and the services provided by the Tribe." Id. at 1265. The District Court held the tax was related to "activities to which the tribe's services are relevant." District Court Op. at 17.

The Tenth Circuit was clearly correct that there was a nexus between the activities of Petitioner's guests and the Navajo Nation. Obviously there is a greater risk of crime, of harm from fires, of accidents, and of medical emergencies at Petitioner's business than there would be if it did not have guests at its facility. Petitioner's guests require services, not just from Petitioner, but from local governments, including the Navajo Nation. "[T]he presence of the guests creates a greater

need, both actual and potential, for tribal services." District Court Op. at 16.[8]

Petitioner asserts that the nexus can only exist if the Navajo Nation rents the motel room to the guest. Petitioner's Brief at 33. If this Court adopts Petitioner's argument, the Court would effectively nullify tribal taxing authority over non-Indians activities on fee lands. Under Petitioner's argument, Montana's first exception only allows the Navajo Nation to tax a transaction to which it is an explicit party. But, of course, if the Navajo Nation were a party, it would not tax the transaction, for the Tribe would be taxing itself.

Petitioner asserts that, so long as its guests do not contract with the Navajo Nation, and so long as the burden they place on the Navajo Nation is not so severe that it "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe," Montana, 450 U.S. at 566,[9] they are free to burden the Navajo Nation's infrastructure and budget, without the Tribe being able to recoup the costs of the services to fee land within its Reservation.[10] As the District Court correctly noted, "Where

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[8] Petitioner argues that the provision of emergency services to non-members cannot establish a consensual relationship between the Navajo Nation and the non-members. Petitioner's only case citation for this argument is Strate, although Petitioner simultaneously acknowledges that the issue was neither presented by the facts in Strate nor ruled upon by this Court. Petitioner's brief at 35.

[9] As discussed below, the second Montana exception is not currently before this Court. *See* Section IV of this brief.

[10] Contrary to Petitioner's assertion, the fact that it and its guests are not tribal members supports the Tenth Circuit's decision. As Petitioner notes, it, and most of its guests, do not have the requisite political relationship with the United States government to qualify for the services which the United

a tribe provides essential services within Indian Country, even to nonmembers and even on fee land ... fairness indicates that it be allowed to impose taxes to help pay for those services." District Court Op. at 13. As the Tenth Circuit correctly held, regardless of whether the second Montana exception applies, the Navajo Nation is able to adopt a tax which recovers the costs of those services, at least so long as the tax "is not disproportionate to the benefits which [Petitioner's guests] receive." Atkinson, 210 F.3d at 1264.

C. *Petitioner concedes that a consensual relationship exists between it and some tribal members and between some of its guests and the Navajo Nation.*

Petitioner asks this Court to rule that it need not collect the hotel occupancy tax because some, but not all, of its guests do not have a consensual relationship with the Navajo Nation. While Amicus Tribes contend that all guests have the requisite relationship and so all guests must pay the tax, the issue in this case is whether Petitioner must collect the tax. Petitioner asked for a declaratory judgment that it should never be required to collect the tax.

The undisputed facts demonstrate that some of Petitioner's guests have the requisite relationship. Petitioner states that its business is "almost exclusively with non-members of the Navajo Nation." Petitioner's Brief at 2, *citing* Pet. App. 96a. *See also*, District Court Op. at 8 (finding that

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States government properly provides to Navajo Indians and which the Navajo Nation provides to its members. Instead, Petitioner brashly argues that they should receive those benefits of being an Indian, without having the requisite relationship and without having to pay a tax which is reasonably related to the benefits they receive.

plaintiff asserted that "most of its guests" were non-members). Implicit in this statement is that some of Petitioner's business is with Tribal members. Petitioner asks this Court to assume, without any factual record, that all of its guests have no consensual relationship to the Navajo Nation, even though the hotel is on the Navajo Reservation, most of the people who live in the area are Navajo, and the Navajo Nation promotes tribal and other on-reservation tourist attractions.

Petitioner further admits that federal anti-discrimination law would prevent it from discriminating against Navajo tribal members, and so tribal members may continue to rent rooms after this Court decides this case. Petitioner's Brief at 32 n.22. Petitioner states that, "[O]f course, federal equal employment law" prohibits Petitioner from discriminating against applicants who are Navajo. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

Under the fact presented by this case, there are lawful applications of the tribal hotel occupancy tax, and those lawful exercises of authority are clearly within the Navajo Nation's retained inherent authority under both Montana and Merrion. Therefore, Petitioner's requested remedy, that Petitioner never needs to comply with the obligation to collect and remit the tax, is clearly not appropriate. Judgment that Petitioner need not collect the tax would only be appropriate if *none* of Petitioner's guests had the requisite relationship.[11]

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[11] Further, as the record in this matter clearly shows, none of Petitioner's guests are parties to this action and none are challenging the Navajo Nation's authority to impose the tax. Petitioner can only make vague generalizations about the taxpayers and conjecture about the taxpayers' relationships with the Navajo Nation, but Petitioner cannot point to a single taxpayer who does not have a consensual relationship with the Navajo Nation, and who disputes, on the record here, the Navajo Nation's authority to impose the tax or the guests' obligation to pay it. Instead, Petitioner

IV. THE ISSUE OF WHETHER THE SECOND MONTANA EXCEPTION APPLIES IS NOT PROPERLY BEFORE THIS COURT BECAUSE THAT MATTER WAS NOT DECIDED BY EITHER THE DISTRICT COURT OR THE COURT OF APPEALS.

As clearly explained in footnote eight of the Tenth Circuit's decision, neither the District Court nor the Court of Appeals ruled upon whether the second Montana exception applied under the facts of this case. Nevertheless, Petitioner asks this Court to determine that the second Montana exception does not apply, Petitioner's Br. at §II.B., and then to "hold that the Navajo Nation may not apply its hotel occupancy tax to a transaction between nonmembers on fee land." Petitioner's Br. at 41.

The Navajo Supreme Court held that both Montana exceptions applied to the present case. Because the U.S. District Court held that the first Montana exception applied, there was no need to reach the issue of whether the second exception applied.

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disputes the burden imposed by its obligation to collect and remit the tax.

This Court should not issue an advisory opinion, based upon this record, regarding the duties of taxpayers who are not even part of this suit. Wilson v. Cook, 327 U.S. 474, 490 (1946) (holding it is improper for Court "to render an advisory opinion upon the validity of a tax of uncertain and speculative application."). The rule against advisory opinions is, of course, well-established. *See e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Maryland Cas. Co. v. Pacific Cola & Oil Co., 312 U.S. 270 (1941); Hayburn's Case, 2 Dall. 408 (1792). If actual taxpayers complain, the Court will then be able to determine whether those taxpayers have consensual relationships.

> The district court did not rule out the possibility that the power to tax might arise from the second "significant-impacts" exception to the Montana rule. . . . The District Court appeared to condone the Navajo Supreme Court's conclusion [regarding the second Montana exception] . . .In our review of the District Court's opinion in this case, however, the applicability of the second exception to the Montana rule is not at issue. We therefore do not address its application to the Navajo Hotel Occupancy Tax.

Atkinson 210 F.3d at 1254 n.8.

Petitioner acknowledges that no federal court has ruled on whether the second Montana exception applies, Petitioner's Br. at 37 n.26, but, without legal analysis, asserts that this Court should be the first federal court to rule on whether the second Montana exception applies to the facts of this case.

This Court has consistently and repeatedly held that, "we do not decide in the first instance issues not decided below." National Collegiate Athletic Assn. v. Smith, 525 U.S. 459, 470 (1999); *see also*, Adickes v. S.H.Kress Co., 398 U.S. 144, 147 n.2. (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). There is no lower court decision on the second Montana exception, therefore, this Court should not issue a ruling on the second Montana exception.

The issue which this Court accepted, but which this case does not present is: "Whether an Indian Tribe may tax a transaction occurring between two non-Indians on fee land within the Reservation." At most, Petitioner's brief presents the issue of whether the Navajo Nation has authority to tax

under the first Montana exception, and this Court therefore cannot reach any issue involving the second Montana exception.

CONCLUSION

For the reasons stated above, this Court should affirm the grant of summary judgment in favor of the Navajo Nation.

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ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICI CURIAE* OF ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA, AND ST. CROIX CHIPPEWA INDIANS OF WISCONSIN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Confederated Tribes of the Colville Reservation, Lac du Flambeau Band of Lake Superior Chippewa, and St. Croix Chippewa Indians of Wisconsin, respectfully submit this brief *amici curiae* in support of Respondents by and through their attorneys pursuant to Sup. Ct. R. 37.3.

Amici are federally-recognized Indian tribes each with a reservation, on which they provide basic governmental services. These services include, but are not limited to, police and fire protection, emergency medical services, construction and maintenance of roads, environmental protection, natural resource management, public health, and sanitation.

Amici therefore have an interest in the outcome of this case concerning tribal authority to impose reasonable taxes on transactions on reservation fee lands involving non-members who benefit from services and the civilized society provided by tribal governments.

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[1] The parties have consented to the filing of this brief and a joint letter evidencing their consent has been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Sup. Ct. R. 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. Indian tribes retain their inherent sovereign authority to tax, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.* at 137; *see also Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 198, 201 (1985). This power "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Merrion*, 455 U.S. at 137. When a tribe's inherent sovereign authority to tax is challenged, the basic question is whether the tribal interests that justify the tax, and the benefits provided to the taxpayer by the tribe, outweigh the burden of the tax.

2. The decisions in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), do not conflict with this test. Indeed, these decisions recognize tribal tax authority and confirm that this authority may extend to non-Indian activity on non-Indian owned fee land, *Montana*, 450 U.S. at 565-66; *Strate*, 520 U.S. at 457, as *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), on which these cases rely, confirms. Thus, properly read, the principles of *Montana* simply inform the application of the *Merrion* test.

3. In this case, the *Merrion* test, as informed by the consensual relationship test of *Montana*, establishes that the tribal tax is valid. By choosing to lodge on the Reservation, and to avail themselves of the benefits and services of tribal governance, travelers and tourists establish a consensual relationship between themselves and the Nation and a significant tribal interest in the activity subject to the tax. In addition, the value of the Navajo Reservation as a stopping

point for travelers and tourists is generated in significant part by the Nation's governance of the Reservation, a value which extends to the Atkinson Trading Company and its patrons. In this case, there is no question that the burden of the tax is reasonable, as was conceded in the Court below. Indeed, the Navajo tax is actually imposed at a lower rate than that imposed by many municipalities. *Atkinson Trading Co. v. Shirley*, 210 F. 3d 1247, 1264 (10th Cir. 2000).

4. The same conclusion is sustained by the *Merrion* test, read in conjunction with the second *Montana* exception. In order to establish and maintain a civil society, a tribe must provide governance, stability, and services sufficient to attract persons and entities to live, work and make their lives on the reservation. When the tribe has provided an environment that does so, the economic activities of those who benefit from it clearly have a direct effect on the political integrity, economic security, and the health and welfare of the tribe. The exercise of the tax power over non-Indian activities on non-Indian owned fee land in these circumstances is thus essential to the right of self-government, *Merrion*, 455 U.S. at 137; *Kerr-McGee*, 471 U.S. at 201, and valid under the second *Montana* exception. *See Strate*, 520 U.S. at 459.

ARGUMENT

I. *MERRION* RECOGNIZES THAT THE TRIBAL POWER TO TAX IS AN ESSENTIAL ELEMENT OF INDIAN TRIBES' RETAINED POWERS OF SELF-GOVERNMENT

A. The Federal Goals of Self-Determination and Self-Sufficiency Depend on the Tribal Tax Power

Indian tribes are now pursuing "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216 (1987). Thus, Indian tribes today police their own reservations, operate fire departments, adjudicate civil and criminal matters, provide emergency medical services, and protect the lands and waters of the reservation. They face substantial challenges in this effort, as is reflected in a wide range of social indicators showing that Indian people live in conditions that are far below the national average in virtually every significant category.[2] While much

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[2] As Senator McCain starkly acknowledged in 1995:

> Indian families live below the poverty line at rates nearly three times the national average. Nearly one of every three Native Americans lives below the poverty line. One-half of all Indian children on reservations under the age of 6 are living in poverty.
>
> On average, Indian families earn less than two-thirds the incomes of non-Indian families. As these statistics indicate, poverty in Indian country is an everyday reality that pervades every aspect of Indian life. In this country we pride ourselves on our ability to provide homes for our loved ones. But in Indian country a good, safe home

remains to be done, the tribes' pursuit of self-determination has already had a significant positive impact. As is particularly relevant here, it has brought more people – Indian and non-Indian alike – to Indian country to live, work, visit and partake of Indian history and culture as understood by Indian people.

Whether Indian tribes can succeed in their pursuit of self-determination and self-sufficiency will depend, in large part, on whether they can raise the revenues needed to operate their governments, provide the services on which reservation residents and visitors depend, and build their economies. To do so, tribal governments, like their state and federal counterparts, must rely on the tax power.

B. Indian Tribes' Inherent Sovereign Authority to Tax Economic Activity on the Reservation is a Right of Self-Government

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is a rare commodity.

There are approximately 90,000 Indian families in Indian country who are homeless or under-housed. Nearly one in five Indian homes on the reservation are classified as severely overcrowded. One third are overcrowded. One out of every five Indian homes lacks adequate plumbing facilities. Simple conveniences that the rest of us take for granted remain out of the grasp of many Indian families.

Indians suffer from diabetes at 2½ times the national rate. Indian children suffer the awful effects of fetal alcohol syndrome at rates far exceeding the national average. Perhaps most shocking of all, Indian youth between 5 and 14 years of age commit suicide at twice the national rate. The suicide rate for Indians between the ages of 15 and 24 is nearly three times the national rate.

141 CONG. REC. S11,881 (1995) (Statement of Sen. McCain).

That Indian tribes retain their inherent sovereign authority to tax is undeniable. This Court's landmark ruling in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), established that the tribal power to tax is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.* at 137. This was confirmed by the Court in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), which holds that "[t]he power to tax members and non-Indians alike is surely an essential attribute of . . . self-government; the Navajos can gain independence from the federal government only by financing their own police force, schools and social programs." *Id.* at 201; *see also, Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980).

In so holding, *Merrion* and *Colville* also make clear that Indian tribes have not been implicitly divested of their power to tax. *Merrion*, 455 U.S. at 139-40, 145; *Colville*, 447 U.S. at 152-54. As the Court held in *Merrion*, relying on *Colville*, "[v]iewing the taxing power of Indian tribes as an essential instrument of self-government and territorial management has been a shared assumption of all three branches of the Federal Government." *Merrion*, 544 U.S. at 139. Accordingly, tribal powers to tax "are not implicitly divested by virtue of the tribes' dependent status." *Colville*, 447 U.S. at 153.

The tribal tax power "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Merrion*, 455 U.S. at 137. These principles reflect "the views of the three federal branches of government, as well as general principles of taxation . . . that Indian tribes enjoy authority to

finance their governmental services through taxation of non-Indians who benefit from those services." *Id.* at 140.[3]

The Court's holding in *Merrion* setting forth the source of the tribal tax power also describes its bounds. That power arises from the tribe's authority to control economic activities on the reservation and to defray the cost of providing governmental services by requiring contributions from those engaged in such activities. *Id.* at 137. When a tribal tax is challenged, the basic question is whether (1) the tribal interests that justify the tax and (2) the benefits provided to the taxpayer by the tribe (3) outweigh the burden of the tax.

The application of the test requires a concrete factual setting. But the contours of the test are reflected in *Merrion* and *Colville*. We consider each element in turn.

Merrion confirms that the tribal interest in taxation is established by the fundamental importance of taxation to tribal governance. Taxation enables a government to raise the revenues necessary to meet its responsibilities to protect persons and property, and to provide a social and economic environment that will attract persons and entities to visit, live, and work within the sovereign's borders. "The power to tax is basic to the power of the State to exist." *Arkansas v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826 (1997) (citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). So

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[3] The *Merrion* Court's examination of the source of tribal tax authority also rejects any claim that its existence depends exclusively on the tribe's power to exclude nonmembers from tribal lands. *Id.* at 137-144. "[T]he Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management." *Id.* at 141. Thus, the status of the land on which taxable activity occurs is not determinative of the existence of this power, as we show *infra* at 9-19.

too with Indian tribes. It is also clear that the tribal interest in a tax may be enhanced by its relationship to the taxable activity. As the Court stated in *Merrion*, "the tribe's interest in levying taxes on nonmembers to raise 'revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.'" *Merrion*, 455 U.S. at 138 (quoting *Colville*, 447 U.S. at 156-57).

Merrion also establishes that the benefits which support tribal taxation include the "substantial privilege of carrying on business on the reservation" and "the provision of police protection and other governmental services, as well as . . . the advantages of a civilized society that are assured by the existence of tribal government." *Merrion*, 455 U.S. at 137-38 (citations and internal quotations omitted). These benefits are reflected in the stability that tribal government provides to social and economic relations on the reservation, and in the services that the tribe provides to those engaged in such relations.

These two elements, the tribal interest in the tax and the benefits to the taxpayer, are weighed against the burden of the tax on the taxpayer. Whether the taxpayer's "contribution 'to the general cost of providing governmental services,'" *id.* at 138 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981)), imposes a burden which exceeds the weight of the first two elements will depend on the specific requirements of the tax under review.[4] The test is, of course, not whether the tax paid equals the value of the services

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[4] We note that the taxpayer in *Merrion* "d[id] not challenge the tax on the ground that the amount of the tax was not fairly related to the services provided by the Tribe." *Merrion*, 455 U.S. at 157.

consumed. The "advantages of a civilized society," *Merrion*, 455 U.S. at 137, are in this regard like the "intangible value of citizenship in an organized society [and are] not easily measured in dollars and cents." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189 (1989). In addition, settled law makes clear that a tax is not subject to challenge on the ground that the taxpayer does not receive benefits equal in value to the tax paid. *Id.* at 189-91.

These principles confirm the power of Indian tribes to tax non-Indian activities on the reservation. The only question to be determined is whether the specific tribal tax properly reaches the specific non-Indian activity.

II. *MONTANA* AND *STRATE* INFORM THE APPLICATION OF THE *MERRION* TEST REGARDING THE POWER TO TAX ACTIVITY ON NON-INDIAN-OWNED FEE LAND

A. The Principles of *Merrion* are Reinforced by *Montana* and *Strate*

Under *Merrion*, the validity of a tribal tax on non-Indian activity turns on whether the tribal interest in the economic activity subject to the tax, together with the benefits provided to the taxpayer by the tribe, outweigh the burden of the tax on the taxpayer. The decisions in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), do not conflict with this test, or with the principles of *Merrion*, *Kerr-McGee* or *Colville*.[5]

Neither *Montana* nor *Strate* presented a question of tribal tax authority. These cases address the exercise of tribal civil regulatory and adjudicatory authority over non-Indians on non-

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[5] *Montana* was decided before *Merrion* and *Kerr-McGee*.

Indian owned fee land. In *Montana*, the Court held that the Crow Tribe could not prohibit non-Indians from hunting and fishing on non-Indian owned fee land. *Montana*, 450 U.S. at 563-67.[6] In *Strate*, the Court held that tribal civil adjudicatory jurisdiction was lacking over a tort suit between two non-Indians arising from a motor vehicle accident on a public highway which the Court held was the legal equivalent of non-Indian owned fee land. *Strate*, 520 U.S. at 456-60. In *Strate*, the Court indicated that *Montana* "describe[s] a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions." *Id.* at 446. The first exception "covers 'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Id.* at 456-57 (quoting *Montana*, 450 U.S. at 565). The second exception applies to "conduct that 'threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.'" *Id.* at 457 (quoting *Montana*, 450 U.S. at 566).

While not tax cases, *Montana* and *Strate* actually reinforce this Court's tribal tax decisions. *Montana* specifically acknowledges that the exercise of the tribal tax power upheld in *Colville*, *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), is in accord with the first of the two *Montana* exceptions. *Montana*, 450 U.S. at 565-66. *Strate* confirms the same conclusion. *Strate*, 520 U.S. at 457. Indeed, *Buster*, which the Court also relied on in *Merrion*, 455 U.S. at 141, and *Colville*, 447 U.S. at 153,

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[6] In contrast to the *Montana* ruling on this regulatory issue, it is clear that the tribal power to tax is a retained power of tribal self-government, as we show *supra* at 6.

expressly upheld a tax on non-Indian activity on non-Indian owned fee land.

Accordingly, the principles of *Montana* simply inform the application of the *Merrion* test. When a tribe's inherent sovereign authority to tax non-Indian activity on non-Indian owned fee land is challenged, the determination of the tribal interest in the economic activity subject to the tax, and of the benefits provided to the taxpayer by the tribe, should reflect the inquiries addressed in the *Montana* exceptions. This should, of course, be done with recognition that the tribal tax authority is different in kind and purpose from tribal regulatory authority. This gives effect to both the holdings in *Merrion* and *Kerr-McGee*, which recognize that tribal tax power over non-Indians is an essential element of the right of self-government, and to the principles of *Montana* and *Strate*. In short, land ownership is not determinative, but is rather only one factor to be considered.

B. The *Merrion* Test, as Informed by the First *Montana* Exception, Establishes that the Tax Here at Issue Applies to All Reservation Tourists and Travelers

The application of the *Merrion* test is informed by the consensual relationship exception of *Montana* in the following manner. Under the *Merrion* test, the tribal interest in the tax is shown by the importance of taxation to a government's ability to function, and by recognition that this interest "'is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.'" *Merrion*, 455 U.S. at 138 (quoting *Colville* 447 U.S. at 156-57). The *Merrion* test then seeks to evaluate the benefits to the taxpayer from the stability and services that tribal government provides to those engaged in economic activities on the reservation.

The consensual relationship exception in *Montana* inquires whether the non-Indian subject to the tribal enactment has entered into consensual relationships with the tribe or tribal members.[7] Its requirements may be met in either of two circumstances.

First, such relationships may arise from consumer transactions, as in *Colville,* from agreements for the use of tribal lands, as in *Merrion*,[8] or from other arrangements between the non-Indian and the tribe or its members. In these instances, the requirements of the consensual relationship exception are plainly met. A tax on the non-Indian activities may then be imposed and is valid, whether these activities occur on non-Indian owned fee land or Indian land.

Second, a consensual relationship between the tribe and the non-Indian subject to a tribal tax may be shown where the tribe provides benefits on which the taxpayer relies. In these

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[7] In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), this Court pointed out that "[a] tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established." *Id.* at 333. Thus, although Petitioner's customers may enter the Navajo Reservation on public highways, this exception to the tribe's power to exclude does not limit the lesser power of the Navajo Nation to tax commercial transactions in which they engage while within its reservation, whether or not on fee lands. *See Morris v. Hitchcock*, 194 U.S. 384, 392-93 (1904) (tribal tax upon livestock grazed by nonmembers on fee lands upheld); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983) (business license fee and tax on nonmember business activities on fee lands within reservation sustained); *see also, Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (tribal zoning of fee lands owned by nonmembers in "closed area" of reservation upheld).

[8] As *Merrion* shows, when there is such an agreement, the tribal power to tax exists and is unaffected by the agreement in the absence of a "clear and unmistakable surrender of taxing power." *Merrion*, 455 U.S. at 148.

circumstances, the consensual relationship arises from the tribe's provision of an environment that attracts persons and entities to visit, live, and work on the reservation and the taxpayer's consumption and reliance on the benefits and services so provided. In this context, the consensual relationship exception recognizes *first*, that the availability of fire, police, and other services, as well as the advantages of a civilized society, depend on a government's ability to raise taxes; and, *second*, that participation in reservation affairs and enjoyment of the accompanying benefits provided by the tribe, whether for business, community, tourism or other purposes, is a voluntary act. Thus, if a taxpayer benefits from these services and from the ordered society maintained by tribal governance, a consensual relationship is established.

Applying the *Merrion* test, as informed by the first *Montana* exception, it is clear that the Navajo Nation's interest in applying its hotel occupancy tax to persons who visit the Reservation as tourists and travelers and stay at the Atkinson Trading Company is substantial and reflects significant consensual relationships. By entering the Navājo Reservation, choosing to stay there overnight, and availing themselves of the benefits of the Navajo Reservation, including the protection and security afforded by tribal governance, travelers and tourists establish a consensual relationship between themselves and the Nation and create a significant tribal interest in the activity subject to the tax.[9] Travelers and tourists depend on

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[9] Notwithstanding the fact that its operations are conducted solely on fee lands, Atkinson Trading Company has been determined to be an "Indian trader" and thus subject to regulations promulgated by the Commissioner of Indian Affairs. *Ashcroft v. United States Dept. of Interior*, 679 F.2d 196 (9th Cir. 1982); *see also*, Act of March 3, 1903, ch. 994, § 10, 32 Stat. 1009 (codified at 25 U.S.C. § 262). The applicable regulations covering trading on the Navajo Reservation, 25 C.F.R. Part 141, provide in material part:

both the benefits of a civilized society and the availability of essential services when seeking lodgings. If police, fire and emergency medical services were not available, the security that a lodger needs for rest and recreation would be lacking. In contrast, where such services are available, the expectations necessary to enjoy a hotel stay are present. Thus, the value of these services is received whether or not an individual has occasion to call upon their availability.[10]

> The regulations in this part do not preclude the Hopi, Navajo, or Zuni tribal councils from assessing and collecting such fees or taxes as they may deem appropriate from reservation businesses.

25 C.F.R. § 141.11(a). By continuing to do business within the Navajo Reservation and thus remaining subject to the foregoing regulations, Atkinson Trading Company necessarily accepted application of the Navajo hotel occupancy tax to its commercial rentals.

[10] This is true not simply as a matter of fact, but also as a matter of law. Thus, as the Court made clear in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), in rejecting a tribal challenge to state taxation of a non-Indian mineral rights lessee's activities on trust lands:

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government – that it exists primarily to provide for the common good.

Id. at 190 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609,

In addition, the value which is taxed by the Nation in this case is generated on the Reservation by activities that involve the Nation. The value of the Navajo Reservation as a stopping point for travelers and tourists is generated in significant part by the Nation's governance of the Reservation, which makes the Reservation a safe and attractive location for travelers and tourists. There is nothing to suggest that the isolated parcel of fee land on which the Atkinson Trading Company is located has somehow been exempted from the creation of this value.

In these circumstances, the ownership status of land on which the hotel is located has little, if any, relevance. The tax here at issue is imposed on the tourist, not the fee land owner. The tourist plainly has no interest in who owns the parcel on which the hotel is located, and the hotel owner simply collects the tax, which is hardly an undue burden. *Cf. Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980).

Under the *Merrion* test, as informed by the first *Montana* exception, these consensual relationships establish that the Nation has a substantial interest in the tax, and that the taxpayer benefits from the existence of tribal government and the services it provides. The question is then whether these elements, and the consensual relationships which they reflect, outweigh the burden of the tax. In this case, there is no question that the burden of the tax is reasonable. Indeed, here as in *Merrion*, no challenge to the tax is advanced on this ground, nor was such a challenge made in the courts below. *See Atkinson Trading Co. v. Shirley*, 210 F. 3d 1247 (10th Cir. 2000). Even in the absence of the petitioner's concession that the contribution required by the Nation's 8 percent tax is

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622 (1981), in turn quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937)). The same rule applies here.

reasonable, the same conclusion is sustained by the Tenth Circuit's holding that the "burden imposed on [petitioner's] guests in not disproportionate to the benefits they receive by availing themselves of Navajo tribal services, including tourist services." *Id.* at 1264. As the Court held, both Arizona and New Mexico authorize municipalities to apply occupancy taxes which operate in the same manner as the Navajo Nation's tax. *Id.* at 1262-63. Moreover, the Navajo tax is actually imposed at a lower rate than that imposed by many municipalities. *Id.* at 1264. Accordingly, the tax may validly be applied to patrons of the Atkinson Trading Post.

C. The Tribal Tax Here At Issue Is Essential to Tribal Self-Government, as the *Merrion* Test, Informed by the Second *Montana* Exception Shows

Both the *Merrion* test and the second *Montana* exception recognize that the power to tax has a vital and irreplaceable function in tribal government: it enables a tribe to meet its basic governmental responsibilities by "requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Merrion*, 455 U.S. at 137. It is thus essential to the right of self-government. *Id.*; *see also Kerr-McGee*, 471 U.S. at 201.

This interest is given effect in the *Merrion* test, which then inquires whether the taxpayer benefits from the operation of tribal government and the services that it provides. The second *Montana* exception asks whether the taxpayer's activity has a threatened or some direct effect on the political integrity, economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 566. Here, the question is whether the exercise of the tax power over such activity is a necessary component of tribal self-government. *Strate*, 520 U.S. at 459. Under both, the question is essentially whether the taxable activity has an effect on tribal government's fulfillment of its

basic responsibilities to govern the reservation, and to provide services to those who visit, live and work there. Thus, if the non-Indian activities that are subject to the tax draw upon the benefits of tribal governance and services, and the purpose of the tax is to require those who enjoy such benefits to contribute to their cost, then the exercise of the tax power is essential to the right of self-government, and the requirements of both *Merrion* and the second *Montana* exception are satisfied.

In contrast, the exercise of regulatory authority over non-Indian activity on non-Indian owned fee land is generally supported by a showing that the regulation is necessary to prevent private actions from causing harm to public interests. As *Montana* illustrates, when no such showing is made, the asserted regulatory power cannot be sustained. *Montana*, 450 U.S. at 566-67; *see also*, *Strate*, 520 U.S. at 457-8. A showing of this kind is not necessary to sustain the validity of a tribal tax because the role of taxation is to sustain the government's affirmative obligations, not to prevent private action from causing public harm.

The second *Montana* exception, as applied in the context of the tribal tax power, recognizes that in order to establish and maintain a civil society, a tribe must provide an environment that will attract persons and entities to live, work and make their lives in the reservation's communities. Without fire, police, health and related services, Indian tribes simply cannot remain competitive with other locales that can – through the exercise of the tax power – provide such an attractive environment. The second exception also recognizes that, when the tribe has itself provided this environment, the economic activities of those who benefit from it clearly have a direct effect on the political integrity, economic security, and the health and welfare of the tribe. The activities of such persons

and entities make up the economy of the reservation on which the future of self-determination and self-sufficiency depend.

Furthermore, if a tribal tax enacted to require those who benefit from tribal governance and services to contribute to their cost were held not to apply to non-Indian activity on non-Indian owned fee land, then those who do pay the tax, as well as the tribe itself, would be forced to pay the non-Indians' share. There is no other reasonable option, for denying such benefits to non-Indian fee land owners would plainly impair the development of the reservation's social and economic environment, thus directly conflicting with the federal policy of self-determination, "including its overriding goal of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (internal quotations omitted). Such action might also subject the tribe to claims under the equal protection provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(8). In these circumstances, then, the exercise of the tribal tax power over non-Indian activity on fee lands is necessary to protect the tribal right of self-government. *Cf. Strate*, 520 U.S. at 459.

As applied to this case, both the *Merrion* test and the second *Montana* exception confirm the validity of the tribal tax. The travelers and tourists who are subject to the tax plainly draw upon the benefits of tribal governance and the services it provides, as we have shown *supra* at 13-15, which establishes a substantial tribal interest in taxing these activities. Additionally, their activities have a direct effect on the political integrity, economic security, and the health and welfare of the tribe for the reasons just shown. Finally, it is clear that the burden of the hotel occupancy tax at issue here is reasonable. *See supra* at 15-16.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

JOE SHIRLEY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF THE COLORADO RIVER INDIAN TRIBES, EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, FIRST MESA CONSOLIDATED VILLAGES OF THE HOPI TRIBE, LUMMI NATION, PUEBLO OF SAN FELIPE, AND ZUNI INDIAN TRIBE SUPPORTING RESPONDENTS

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BRIEF *AMICI CURIAE* OF THE COLORADO RIVER INDIAN TRIBES, EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, FIRST MESA CONSOLIDATED VILLAGES OF THE HOPI TRIBE, LUMMI NATION, PUEBLO OF SAN FELIPE, AND ZUNI INDIAN TRIBE SUPPORTING RESPONDENTS

Pursuant to Sup. Ct. R. 37, the Colorado River Indian Tribes of Arizona and California, the Eastern Shoshone Tribe of the Wind River Reservation of Wyoming, First Mesa Consolidated Villages of the Hopi Tribe of Arizona, the Lummi Nation of Washington, the Pueblo of San Felipe of New Mexico, and the Zuni Indian Tribe of New Mexico and Arizona file this brief *amici curiae* in support of Respondents in the above-entitled case. Petitioner, Atkinson Trading Company, Inc., and Respondents, Joe Shirley, *et al.*, have consented in writing to the filing of this brief.[1]

INTEREST OF *AMICI CURIAE*

Amici are five Indian tribes – the Colorado River Indian Tribes, the Eastern Shoshone Tribe, the Lummi Nation, the Pueblo of San Felipe, and the Zuni Tribe – and First Mesa Consolidated Villages, one of the nine self-governing villages of the Hopi Tribe. *Amici* share a common interest in the perpetuation of tribal governments, the fostering of tribal judicial systems, and the

[1] This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

defense of tribal sovereignty. *Amici* were affected to varying degrees by the assimilationist policies that held sway at the end of the 19th century. While all of the *amici* suffered substantial losses to their ancestral lands, the lands established as reservations for the Pueblo of San Felipe, the Hopi Tribe and the Zuni Tribe have remained largely intact. In contrast, much of the reservation land of the Colorado River Indian Tribes, the Eastern Shoshone Tribe, and the Lummi Nation was allotted to individual tribal members, with the remainder opened to non-Indian settlement pursuant to the General Allotment (Dawes) Act. Ch. 119, 24 Stat. 388 (1887). While the policies that paved the way for this encroachment on the tribal land base have been repudiated by Congress, remnants of these policies persist. The most notable reminder of these destructive policies is the presence within many reservations of substantial quantities of non-Indian owned fee land.

Like the Navajo Nation, *Amici* exercise jurisdiction over reservation lands. Tribal efforts to govern all the lands within their reservations, particularly non-Indian owned fee lands, has proven to be one of the greatest challenges to tribal self-government. *Amici* urge the Court to hold that questions regarding the scope of tribal legislative authority, including the tribal power to tax and regulate activities occurring within their reservations, are questions of tribal law. *Amici* acknowledge that at times these questions must be answered with reference to the dictates of Congress as reflected in treaties, statutes, and opinions of the federal courts construing Congressional intent. However, *amici* do not believe that this reference to federal law turns every assertion of tribal legislative

power over non-Indians found within their reservations into a federal question subject to review in the federal courts.

SUMMARY OF ARGUMENT

This brief will address what is sometimes referred to as the "Indian abstention" doctrine and the scope of federal court review when an Indian tribal court has decided that it has jurisdiction to review a reservation-based matter involving non-Indian parties and has decided the case before it on the merits.

We begin, as we must, with a review of Congressional pronouncements on these issues. However, that review is brief, as "there is no . . . legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians." *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 854 (1985). Nevertheless, in *National Farmers Union*, this Court held that a challenge to a tribal court's assertion of civil adjudicatory power over a non-Indian must be answered with reference to federal law and therefore gives rise to a federal question. *Id.* at 852. However, the Court also established a rule requiring as a matter of comity that federal courts abstain when presented with a civil matter arising out of reservation based activity, regardless of the source of federal jurisdiction, to allow the tribal courts to determine their jurisdiction in the first instance. *Id.* at 856-57; *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). *Amici* argue that, read together, the holdings of *National Farmers Union* and *Iowa Mutual* establish the

proper balance between the interests of Indian tribes in comprehensive jurisdiction over their reservations and the interests of non-Indians engaged in activity within reservation boundaries. The decisions establish a rule of deference to tribal court decision-making while providing adequate protection, through federal court review of tribal court assertions of adjudicatory jurisdiction, for non-Indians.

Amici argue further that *Iowa Mutual* establishes the scope of federal court review after a party has exhausted its tribal remedies. In *Iowa Mutual*, the Court instructed that, if a federal court determines that a tribal court properly decided the question of its jurisdiction, there will typically be no need for further federal court involvement. The tribal court's decision on the merits should be allowed to stand.

Federal courts are courts of limited jurisdiction. This Court has not previously held that an Indian tribe's assertion of legislative authority over activities engaged in by non-Indians on non-Indian owned fee lands gives rise to a federal question. *Amici* argue that this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), opens the back door to the federal courts by equating a tribe's civil adjudicatory authority to its legislative authority. That decision suggests that the lower federal courts may look behind a tribal court's determination of its subject matter jurisdiction to review the separate and distinctly tribal law question of a tribe's legislative authority over non-Indians within the reservation. *Amici* argue that such review exceeds the jurisdiction of the federal courts.

However, even if the Court holds that a tribe's assertion of legislative jurisdiction over a non-member engaged in activity on non-Indian owned fee lands presents a federal question, the abstention rule adopted in *National Farmers Union* and *Iowa Mutual* should still apply. *Amici* urge the Court to adopt a standard of post-exhaustion review that affords tribal decisions greater deference than that applied to date by the courts of appeals, including the Tenth Circuit below. Given well-established Congressional support for tribal self-government and self-determination, and acknowledging that Congress has not spoken in this area, caution is advised lest "unconditional access to the federal forum . . . impair the [tribes'] authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16.

Below, the district court and the court of appeals correctly decided that the Supreme Court of the Navajo Nation had jurisdiction to decide Petitioner's challenge to the Nation's Hotel Occupancy Tax. The courts below went on to hold that the Navajo Nation possessed, as a matter of federal law, jurisdiction to impose the tax in question on non-Indians purchasing lodging on fee lands within the reservation. While *amici* agree with that conclusion, they believe that, having found that the tribal court had jurisdiction to hear the mattter, no further inquiry into the merits of the case was either required or permitted. Accordingly, *amici* urge the Court to affirm the decision of the court of appeals that the Supreme Court of the Navajo Nation had jurisdiction to decide whether the Nation's Hotel Occupancy Tax was properly applied to Petitioner's non-Indian hotel guests. However, having resolved the federal question presented in the Nation's

favor, the court of appeals should have dismissed Petitioner's claim rather than proceeding to review the claim on the merits.

ARGUMENT

I. FEDERAL COURT ABSTENTION WAS APPROPRIATE IN THIS MATTER

In *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, this Court held that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331." 471 U.S. 845, 852. Declining to adopt a bright line rule foreclosing tribal court jurisdiction over civil matters arising on an Indian reservation and involving non-Indians,[2] the Court found that "the existence and extent of a tribal court's [civil] jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," an examination that "should be conducted in the first instance in the Tribal

[2] *Compare Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), holding categorically that an Indian tribe cannot exercise criminal jurisdiction over non-Indians.

Court itself." *Id.* at 855-56 (footnotes omitted).[3] Accordingly, the Court announced a rule requiring that a federal court stay its hand until a tribal court has had a full opportunity to determine its own jurisdiction. *Id.* at 857. The Court left to the lower courts the decision whether a federal action should be dismissed or held in abeyance. *Id.*

Petitioner, Atkinson Trading Company ("Atkinson"), originally filed an action in the United States District Court for the District of New Mexico contesting the power of the Navajo Nation to impose its Hotel Occupancy Tax on the purchase of rooms by non-Indian guests at the Cameron Trading Post, a facility owned by Atkinson and located on land owned by Atkinson in fee within the exterior boundaries of the Navajo reservation. The district court dismissed the matter without prejudice, directing Atkinson to exhaust its tribal remedies as required by *National Farmers Union. Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506 (D.N.M. 1994). Pursuant to this direction, Atkinson filed an appeal with the Navajo Tax Commission, and then, as provided in 24 Navajo Nation Code ("N.N.C.") § 234, appealed to the Navajo Supreme Court from the Commission's decision upholding the applicability of the tax. The Navajo

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[3] Although the Court had enunciated a test for determining the propriety of an Indian tribe's assertion of regulatory jurisdiction over non-members in *Montana v. United States*, 450 U.S. 544 (1981), decided four years earlier, nowhere in *National Farmers Union* did the Court suggest that the *Montana* test should or would guide the tribal court or federal court's decision on whether tribal civil adjudicatory jurisdiction was present.

Supreme Court affirmed the decision of the Tax Commission. The court found that it had jurisdiction to hear the matter pursuant to 7 N.N.C. § 254,[4] and held that the Nation's assertion of taxing jurisdiction was consistent with this Court's rulings in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and *Montana v. United States*. Pet. App. D, p. 76a. Atkinson then returned to the district court, seeking a declaratory judgment that the Nation lacked jurisdiction to impose its Hotel Occupancy Tax.

II. THE POST-EXHAUSTION STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS FAILS TO ACCORD PROPER DEFERENCE TO TRIBAL COURT DECISION-MAKING

The district court applied the standard of review established by the Court of Appeals for the Tenth Circuit in *Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 520 U.S. 1139 (1997). In *Mustang*, the court of appeals held that in reviewing a tribal court's assertion of jurisdiction over non-members, the proper standard of review is for the federal courts to review the

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[4] 7 N.N.C. § 254 provides:

> The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian Communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any band of Navajo Indians.

tribal court's findings of fact for clear error, while subjecting the tribal court's conclusions of law to *de novo* review. *Id.* at 1384.[5] The district court granted the Nation's motion for summary judgment, applying the *Mustang* standard of review. The court of appeals affirmed, *Atkinson Trading Co. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000), and it is from this decision that Petitioner seeks review.

While *amici* tribes believe that both the district court and the court of appeals reached the correct result, in both cases their review of the merits was unnecessary and, in fact, exceeded their authority as defined by the United States Constitution, federal statutes, and the decisions of this Court. Federal courts are courts of limited jurisdiction.[6] In *National Farmers Union*, this Court held that a *tribal court's* assertion of jurisdiction over non-Indians gives rise to a federal question. However, both the district court and the court of appeals collapsed the question of the Navajo Nation's assertion of jurisdiction to adjudicate this civil matter into the question of the Navajo Nation's power to tax non-Indians who procure lodging on fee lands within the Nation's reservation.

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[5] In *Mustang*, the Tenth Circuit adopted the standard of review previously established by the Ninth Circuit in *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991), in which the court observed that the "standard of review of a tribal court decision regarding tribal jurisdiction is a question of first impression among the circuits." *Id.* at 1313. Both the Tenth and the Ninth Circuits failed to consider the direction in *Iowa Mutual*, discussed more fully at pp. 10-12, *infra*, that if the district court determines that the tribal court had jurisdiction, its review is complete.

[6] U.S. Const., Art. 3, sec. 2, cl. 1.

Neither the district court nor the court of appeals even addressed the factors set forth in *National Farmers Union* for determining when a tribal court may exert its civil adjudicatory authority over non-Indians. Instead, each opinion appears to assume that such jurisdiction is proper in the instant case, and discusses the merits of the dispute which have already been disposed of by the Navajo Nation Supreme Court. One possible explanation for this analytical leap is this Court's suggestion in *Strate v. A-1 Contractors*, that as to non-Indians, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." For reasons set forth more fully below, *amici* believe that this suggestion was incorrect.

In *Iowa Mutual Ins. Co. v. LaPlante*, this Court had a second opportunity to consider the application of the Indian abstention doctrine announced in *National Farmers Union*. In *Iowa Mutual*, the insurance company filed an action in the federal district court based on diversity of citizenship under 28 U.S.C. § 1332, asserting it had no duty to defend its insured while an action between the same parties was pending in the Blackfeet Tribal Court system. In reviewing the decision of the tribal trial court, this Court noted that the "tribal court addressed the issue of subject matter jurisdiction, holding that the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation. Since [under Blackfeet law] the Tribe's adjudicative jurisdiction was coextensive with its legislative jurisdiction, the court concluded that it would have jurisdiction over the suit." 480 U.S. 9, 12. Thus, in *Strate* this Court appears to have assumed that this feature of Blackfeet tribal law was a principle of federal law limiting the jurisdiction of all

tribes. That assumption appears to have caused the lower courts to bypass an important step is assessing the decisions of tribal courts such as the one involved in this case.

In *Iowa Mutual* this Court acknowledged that "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Id.* at 14-15. Finding that a "federal court's exercise of jurisdiction can . . . impair the authority of tribal courts," *id.* at 15, the Court concluded that a federal court must abstain in the first instance, regardless of the basis for jurisdiction, because "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs," *id.* at 16. In *Iowa Mutual*, the Court for the first time discussed the scope of review in the federal courts after a tribal court has been given the opportunity to determine its own jurisdiction. The Court held that if the highest tribal court determines that it has jurisdiction, then that ruling is subject to review in the federal courts. The Court continued: "Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues . . . resolved in the Tribal Courts." *Id.* at 19. The Court also opined that the policy considerations which underlie the Indian abstention doctrine are analogous to the principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). *Iowa Mutual*, 480 U.S. at 16 n.8. Even where tribal and federal courts may have concurrent jurisdiction, such as in diversity cases or where tribal court jurisdiction over a non-Indian gives rise to federal question, exhaustion of

tribal remedies is required as a matter of comity and "strong federal policy concerns favor[ ] resolution in the nonfederal forum." *Id.*[7]

Below, the district court dismissed without prejudice the initial action brought by Atkinson, directing that Petitioner first exhaust its tribal remedies. The Navajo Supreme Court found that it had jurisdiction to review the decision of the Navajo Tax Commission holding that Atkinson's hotel guests were subject to the Nation's Hotel Occupancy Tax and affirmed the Commission's decision. Upon the refiling of the matter in the district court, under *Iowa Mutual* the district court should first have determined if the Navajo Supreme Court properly construed its jurisdiction. Having correctly concluded that the Navajo Supreme Court had such jurisdiction, the district court should have dismissed this matter without reaching the merits.

III. GIVEN THE UNIQUE STATUS OF TRIBAL GOVERNMENTS AND CONGRESS' PLENARY POWER OVER INDIAN TRIBES, "FEDERAL QUESTION" JURISDICTION SHOULD BE NARROWLY CONSTRUED TO AVOID SUBJECTING EVERY ACTION BY A TRIBAL GOVERNMENT TO POTENTIAL FEDERAL COURT REVIEW

This Court's holding in *National Farmers Union* that a tribal court's exercise of jurisdiction over non-Indians

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[7] It appears that the Court, while finding the policy bases for Indian abstention analogous to those of *Colorado River* abstention, did not incorporate the other factors applied by the Court in *Colorado River*, such as the requirement that there be an action pending in the tribal court.

gives rise to a federal question is clear. However, the basis for that holding is problematic. The Court held that because "the question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court *is one that must be answered by reference to federal law*," it presents a federal question under 28 U.S.C. § 1331. *National Farmers Union*, 471 U.S. at 852. As the Court also noted, "the power of the Federal Government over the Indian tribes is plenary," *id.* at 851, and to invoke the jurisdiction of the federal courts a party must contend that federal law has curtailed the powers of a tribe.[8] The logical conclusion to this line of analysis is that any exercise of power by a tribal government, whether over members or non-Indians, gives rise to a federal question. Every exercise of tribal power gives rise to the question whether the tribe has been divested of that power by treaty, statute, judicial decision, or by implication because the power is inconsistent with the tribe's "dependent status" upon incorporation within the United States. Applying this logic, the courts of appeals have extended the holding of *National Farmers Union* to encompass assertions of tribal regulatory authority over non-Indians, mistakenly holding that such assertions of tribal governmental power give rise to a federal question. *See, e.g., Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1132 (9th Cir. 1995). This Court's decision in *Strate v. A-1 Contractors* compounds the confusion engendered by *National Farmers Union*.

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[8] It is interesting to note that the "plenary power of Congress," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), over Indian affairs has more recently been characterized by the Court as the plenary power of the "Federal Government."

This Court's decision in *Strate* sent a shock wave through Indian country. The Court's decision – that the test established in *Montana* to determine whether a tribe could exercise civil regulatory authority over the activities of non-Indians on non-Indian owned fee lands is to be the test applied in determining a tribal court's adjudicatory authority over non-Indians – was arrived at through a strained construction of the Court's precedents that began with *Montana* itself.[9]

Discussing those inherent sovereign powers retained by the tribes and those impliedly divested, the Court in *Montana* cited *United States v. Wheeler*, 435 U.S. 313 (1978), for the proposition that "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the *relations between an Indian tribe and nonmembers of the tribe. . . .* " *Id.* at 564 (emphasis and ellipses in *Montana*). The Court omitted the citations which followed this original pronouncement in *Wheeler*. Those citations make clear that the powers the Court was referring to, and which tribes have been impliedly divested of, are powers more consistent with those of an independent foreign state than those of a "dependent" nation incorporated within the United States.[10] The

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[9] While the Court in *Strate* suggested that it was merely applying Court precedent and that there was nothing radical in its holding, the Court of Appeals for the Ninth Circuit observed that "*Strate* altered the lens through which we view the boundaries of a tribal court's civil adjudication." *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1062 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1964 (2000).

[10] The *Wheeler* Court continued:

> Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian*

Court in *Wheeler* did not suggest that tribes had been divested of civil authority over non-Indians found within their territorial jurisdiction.

Eight years later, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), Justice White, writing for a plurality of the Court, expanded *Montana's* mischaracterization of *Wheeler* to a "general principle" that the exercise of tribal regulatory authority over non-Indians without express congressional delegation, with two exceptions, is inconsistent with the tribes' dependent status. *Id.* at 426. As Justice Blackmun pointed

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> *Nation v. County of Oneida*, 414 U.S. 661, 667-668; *Johnson v. M'Intosh*, [21 U.S.] 8 Wheat. 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, [31 U.S.] 6 Pet. 515, 559; *Cherokee Nation v. Georgia*, [30 U.S.] 5 Pet. [1, 17-18]; *Fletcher v. Peck*, [10 U.S.] 6 Cranch 87, 147 (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. *Oliphant v. Suquamish Indian Tribe*, [435 U.S. 191].

435 U.S. at 326 (parallel citations omitted). Similarly, in *Washington v. Confederated Tribes of Colville Indian Reservation*, the Court made the following statement:

> Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

447 U.S. 134, 153-54 (1980).

out in his opinion concurring in the judgment and dissenting:

> But Montana is simply one, and not even the most recent, of a long line of our decisions discussing the nature of inherent tribal sovereignty. These cases, landmarks in 150 years of Indian-law jurisprudence, establish a very different "general principle" governing inherent tribal sovereignty – a principle according to which tribes *retain* their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be inconsistent with the overriding interests of the National Government.

Id. at 450 (quotations omitted) (emphasis in original); *see also South Dakota v. Bourland*, 508 U.S. 679, 699 n.2 (1993) (Blackmun, J., dissenting) (restating objection to the Court's characterization of the holding of *Montana*).

In *Strate*, the Court completed the process of implying divestiture of tribal civil authority by extending that divestiture to tribal adjudicatory power over non-Indians. Confronted with its earlier, and apparently controlling, statement in *Iowa Mutual* that "[c]ivil jurisdiction over such activities [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statutes," the Court proceeded to construe the statement in the "context" of the three cases that *preceded*

it.[11] Viewed in this "context," the Court reframed the statement into "the unremarkable proposition that, where tribes possess the authority to regulate the activities of non-members, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.' " 520 U.S. 438, 453. Having rewritten the Court's precedent, the *Strate* Court announced the corollary, but neither logically nor legally necessary, proposition that "a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction." *Id.* No other court system in the United States is subject to such a limitation. The Court of Appeals for the Ninth Circuit offered a cogent argument for distinguishing between a tribal court's adjudicatory and regulatory jurisdiction:

> Cases are commonly adjudicated in forums that would lack the authority to regulate the subject of the disputes. *See generally Allstate Insurance Company v. Hague*, 449 U.S. 302 (1981). In analyzing whether a dispute may be decided in a particular state or federal court, we have inquired only whether the court's exercise of

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[11] The relevant portion of the Court's analysis in *Iowa Mutual* is as follows:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-566 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980); *Fisher v. District Court [of Sixteenth Judicial Dist. of Mont.]*, 424 U.S. [382,] 387-389 [1976]. Civil jurisdiction over such activities presumptively lies in the tribal court unless affirmatively limited by a specific treaty provision or federal statute. . . .

480 U.S. 9, 18.

> jurisdiction is authorized by the applicable forum law and whether it comports with due process. *See, e.g., Keeton v. Hustler Magazine*, 465 U.S. 770 (1984). The jurisdictional question is not controlled by whether it would be appropriate to apply the forum's substantive law to the dispute. *See Shaffer v. Heitner*, 433 U.S. 186, 215 (1977). The tribal character of a challenged forum does not alter the essential nature of this inquiry. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

National Farmers Union Ins. Companies v. Crow Tribe of Indians, 736 F.2d 1320, 1322 n.3 (9th Cir. 1984), *rev'd on other grounds*, 471 U.S. 845 (1985) (parallel citations omitted). In addition, this Court has acknowledged that "tribal courts, like state courts, can and do decide questions of federal law. . . . " *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999).

Equating tribal adjudicatory power with tribal legislative – including regulatory and taxing – authority, undermines the holdings of *National Farmers Union* and *Iowa Mutual* that decisions of a tribal court are entitled to deference and may be disturbed only when a reviewing federal court finds that the tribal court lacks jurisdiction over the matter. This equation invites the federal courts to look behind a tribal court's jurisdictional determination and review the question of whether the tribal government properly exercised its legislative authority. Federal court review should be limited to the question of whether a tribal court has exceeded its jurisdiction in

adjudicating a matter involving non-Indian activity within Indian country.

Assuming, *arguendo*, that a tribe's efforts to extend its laws to non-Indians on non-Indian owned fee lands does present a federal question, the federal courts should accord significant deference to tribal court decisions construing tribal authority. First, the abstention rule announced in *National Farmers Union* should pertain. Second, post-exhaustion review in the federal courts should be narrow in scope. Congress has not provided for federal court review of tribal court decisions in civil matters by statute.[12] However, Congressional policies supporting tribal self-governance and self-determination suggest that a unique scope of review, tailored to advance these goals, is appropriate.[13] The scope of review adopted by the

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[12] Even when Congress passed the Indian Civil Rights Act, Pub. L. 90-284 (1968) (codified at 25 U.S.C. §§ 1301 *et seq.*), imposing a unique bill of rights on Indian tribes, it did not provide for broad federal court jurisdiction to hear alleged violations of the Act. Accordingly, the Court in *Santa Clara Pueblo* declined to imply a cause of action because "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." 436 U.S. 49, 59-60.

[13] One scholar has suggested borrowing from the jurisprudence of administrative law. *See* Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M.L.Rev. 191, 211 (1994). The author proposes the following procedure:

> [A] federal court would review independently whether the tribal court has adopted the correct test for determining if tribal jurisdiction has not been

courts of appeals, and applied by the courts below, does little to advance these Congressional goals or to enhance the role of tribal courts.

CONCLUSION

In civil matters involving non-Indians arising within the territorial jurisdiction of Indian tribes, the federal courts should abstain, as directed in *National Farmers Union* and *Iowa Mutual*, to allow tribal courts to determine, in the first instance, their adjudicatory jurisdiction, and if they find such jurisdiction, to determine such matters on their merits. As this Court's precedents makes clear, a tribal court's assertion of jurisdiction over a non-Indian presents a federal question. On review in the federal district courts, the court should determine whether the tribal court's decision regarding its adjudicatory jurisdiction was correct. If the district court determines that the tribal court properly exercised its adjudicatory jurisdiction, the case should be dismissed and the tribal court's decision on the merits allowed to stand. Tribal courts play a vital part in tribal self-government. The decisions of tribal courts must be accorded a

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implicitly divested. The second step of the process, however, the task of determining under *Montana*, if a consensual relation existed or if the activity is necessary to tribal self-government or vital to tribal integrity and self-determination, would only be reviewed under a reasonableness or rational basis test.

Id. at 219.

meaningful measure of deference if tribes are to continue to develop competent judiciaries as Congress clearly intended. For all the forgoing reasons, the decision of the Court of Appeals for the Tenth Circuit holding that the courts of the Navajo Nation had jurisdiction to adjudicate Petitioner's tax claim should be affirmed.

Respectfully submitted,

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